

Controlling the Damage Done by *Crawford v. Washington*: Three Constructive Proposals

Donald A. Dripps*

Witness noncooperation is the single greatest reason why the prosecution loses meritorious cases. Lamentably, the Supreme Court has been making matters worse. In Crawford v. Washington and its progeny, the Justices have ruled that the Sixth Amendment Confrontation Clause bars admission of "testimonial hearsay"—an out-of-court statement accusing the defendant—unless the declarant testifies, or is unavailable and the defense had a prior opportunity to cross-examine the declarant concerning the statement. The consequence has been a loss for truth across the board, but the loss is especially pronounced in domestic violence cases.

This symposium challenges the contributing authors to propose some concrete, feasible reform of the criminal justice system. In broad terms I call for a nationwide reexamination of the evidence rules in light of Crawford's impact. More particularly, I call on the Advisory Committee, the Supreme Court, and Congress to amend the Federal Rules of Evidence in three ways: (1) amend FRE 801(d)(1)(A) to permit the substantive use of unsworn prior inconsistent statements in criminal cases; (2) adopt a new FRE 804(b)(5) to permit the substantive use of a declarant's statement taken by the police officer in the presence of the accused, as long as the accused had the chance to explain or deny that statement; and (3) revise FRE 804(b)(6) to make it easier to find that the accused had forfeited his right to confront a witness by creating a permissive presumption that an otherwise-unexplained unavailability of a witness previously injured or threatened by the accused is probably the result of improper pressure brought by the accused.

These proposals, which build on and expand some important prior reform efforts, should help control the harm Crawford v. Washington and its progeny have done to the prosecution of violent crime.

* Professor of Law, University of San Diego. This article builds on an earlier paper, unpublished but widely downloaded, *Sixth-Amendment Originalism's Collision Course with the Right to Counsel: What's Titanic, What's Iceberg?*, San Diego Legal Studies (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952508. My views of the historical record are unchanged since the prior paper, but my proposals for reform are now more detailed and, I hope, sounder.

I. INTRODUCTION: THE CHALLENGE AND THE PROPOSAL

The largest single reason why the prosecution loses meritorious cases is witness noncooperation.¹ Witness problems are pronounced in two especially urgent types of cases: those involving domestic violence² and organized crime.³ In both situations, witnesses often face the threat of violent revenge for testifying truthfully, and the promise of reward for failing to testify or for perjuring themselves on behalf of the defense.

The extent of the problem reflects bedrock principles of Anglo-American trial procedure. The prosecution must adduce trial testimony by witnesses with first-hand knowledge of the accused's guilt, or hearsay evidence falling within one of the exceptions to the rule against it. The proof on the whole must establish guilt beyond a reasonable doubt.

To take a concrete example, suppose a woman is beaten by her intimate partner and receives treatment at the emergency room. The following day she goes to the police station and swears out a complaint. If she subsequently refuses to testify, her sworn statement given the day after the event is inadmissible hearsay. In most jurisdictions, if she takes the stand at trial and testifies that she was not beaten but fell down the stairs, the prior accusation is admissible only to impeach. In the absence of other evidence, there is no proof in the record of the defendant's guilt and the case must be dismissed without reaching the jury.

Lamentably, the Supreme Court has been making matters worse. In *Crawford v. Washington* and its progeny, the Justices have ruled that the Sixth Amendment Confrontation Clause bars admission of "testimonial hearsay"—an out of court statement accusing the defendant—unless the declarant testifies, or is unavailable and the defense had a prior opportunity to cross-examine the declarant concerning the statement.⁴ The consequence has been a loss for truth across the board, but the loss is especially pronounced in domestic violence cases.

¹ See, e.g., FLOYD FEENEY ET AL., ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY 243 (1983) ("Most suspects who are arrested but not convicted are thought by police and prosecutors to be guilty. Many cases of this kind are dropped for evidentiary reasons but could and probably ought to be salvaged."); BRIAN FORST ET AL., ARREST CONVICTABILITY AS A MEASURE OF POLICE PERFORMANCE 9-10 (1982) (in every jurisdiction studied, evidence and witness problems were cited as reasons for rejecting at least 50% of the arrests declined for prosecution; in three jurisdictions the figure was 70% or higher); MICHAEL H. GRAHAM, WITNESS INTIMIDATION: THE LAW'S RESPONSE 3-8 (1985) (reviewing studies).

² See, e.g., Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 768-69 (2005) (noting problem of witness noncooperation in domestic violence cases).

³ See, e.g., *Witness Intimidation: Showdown in the Streets—Breakdown in the Courts, Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103d Cong. 25 (1994) (statement of Gerald Shur, Senior Associate Director, Office of Enforcement Operations, Criminal Division, U.S. Department of Justice, accompanied by Eugene L. Coon, Jr., Chief, Witness Security Division, U.S. Marshals Service).

⁴ 541 U.S. 36, 53-56 (2004).

In response to the symposium's challenging demand for significant yet achievable criminal justice reforms, I call for a nationwide reexamination of the rules of evidence in light of *Crawford*'s impact. Reforming evidence law requires no financial appropriations. Such doctrinal reforms appeal to the same alliance of law-enforcement agencies and women's groups that has achieved such political success as the rape shield laws, anti-stalking statutes, and civil protection orders. Yet reform of evidence law could do much to advance the search for truth at trial.

More particularly, I call on the Advisory Committee, the Supreme Court, and Congress to amend the Federal Rules of Evidence. Although the federal role in prosecuting domestic violence cases is modest compared to that of the states and localities, the Federal Rules have been adopted by a majority of the states. We might, with some confidence, expect amendments to the Federal Rules to become models for reform in the states—especially if those reforms proved salutary in practice.

The literature already includes some important proposals for reform.⁵ Building on some of these proposals, and without opposition to other changes the Advisory Committee, the Court, or the Congress might find more attractive, I propose three specific amendments to the Federal Rules. As set forth in more detail below, the proposed changes are as follows:

- Amend FRE 801(d)(1)(A) to permit the substantive use of unsworn prior inconsistent statements in criminal cases, as is done now under the California Evidence Code section 1235. The practical effect of the change would be to permit the prosecution to get to the jury when the sole witness recants an accusation at trial.
- Adopt a new FRE 804(b)(5), which would permit the substantive use of a declarant's statement taken by the police officer in the presence of the accused, as long as the accused had the chance to explain or deny that statement. The objective of the amendment is to restore the admissibility of statements of the type routinely admitted at the founding. As will be explained in more detail below, the proposal analogizes a police officer called to the scene of an alleged offense to the justice of the peace, who took depositions from witnesses at pretrial examinations under the so-called Marian committal statutes.
- Revise FRE 804(b)(6) to make it easier for a court to find that the accused had forfeited his right to confront a witness by creating a permissive presumption that an otherwise unexplained

⁵ See, e.g., Michael H. Graham, *Fostering Domestic Violence Prosecutions After Crawford/Davis: Proposal for Legislative Action*, 44 CRIM. L. BULL. 871, 872 (2008) (proposing hearsay exception for statements in applications for civil protection orders, and admissibility of prior act evidence in domestic violence prosecutions).

unavailability of a witness previously injured or threatened by the accused is probably the result of improper pressure brought by the accused.

I propose these amendments to control the harm *Crawford v. Washington* and its progeny have done to the prosecution of violent crime, especially domestic violence. Part II of the article summarizes the Supreme Court's new Confrontation Clause doctrine. Part III reports the damage the new law has done, and Part IV explains why alternative damage-control strategies are unpromising. Part V argues that the proposed changes to the evidence rules would go far toward undoing *Crawford*'s mischief, and that each should survive constitutional challenge.

II. CRAWFORD IN CONTEXT

A. *The Confrontation Clause before Crawford*

In 1970, Justice Harlan remarked that "the Confrontation Clause comes to us on faded parchment."⁶ When the Warren Court held that the Fourteenth Amendment incorporates against the states the Fourth Amendment exclusionary rule, the Fifth Amendment privilege against self-incrimination, and the Sixth Amendment Counsel Clause,⁷ the Justices were familiar with a steady stream of federal cases involving these issues. There was a continuous corpus of caselaw, reaching back into the nineteenth century.⁸

The Confrontation Clause was a different matter. Prior to 1965, the Supreme Court had decided only a handful of Confrontation Clause cases.⁹ These cases left the relationship between the constitutional provision and the hearsay rule quite unclear. Why was there such a shortage of precedents?

⁶ *California v. Green*, 399 U.S. 149, 173–74 (1970) (Harlan, J., concurring).

⁷ See *Malloy v. Hogan*, 378 U.S. 1, 3 (1964) (Fifth Amendment privilege); *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963) (incorporating Sixth Amendment right to counsel); *Mapp v. Ohio*, 367 U.S. 643, 656–57 (1961) (incorporating Fourth Amendment exclusionary rule).

⁸ See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 467–68 (1938); *Carroll v. United States*, 267 U.S. 132, 153 (1925) (recognizing automobile exception to Fourth Amendment warrant requirement); *Boyd v. United States*, 116 U.S. 616, 634–35 (1886) (holding that the Fourth and Fifth Amendments, read together, prohibit compelled production of private papers even on a showing of probable cause supported by judicial order), *overruled on other grounds by* *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

⁹ See *Kirby v. United States*, 174 U.S. 47, 55 (1899) (use of theft conviction of *X* to prove that goods received by *D* were stolen violates Confrontation Clause, as *D* had no confrontation of the witnesses who testified to the theft); *Mattox v. United States*, 156 U.S. 237, 244 (1895) (former testimony exception consistent with Confrontation Clause); *Mattox v. United States*, 146 U.S. 140, 151–52 (1892) (dying declarations exception consistent with Confrontation Clause).

The structure of federal evidence law offers a plausible explanation.¹⁰ Before the Federal Rules, federal courts crafted evidence rules as a matter of common law.¹¹ Any defendant pressing both hearsay and confrontation objections would either win the hearsay objection with no constitutional ruling, or lose both objections.

In 1965, *Pointer v. Texas* held that the Confrontation Clause applies to the states through the Fourteenth Amendment.¹² Following Pointer's arrest, but prior to his indictment, the alleged victim, Phillips, testified under oath at a preliminary examination.¹³ At the examination, neither Pointer nor his suspected accomplice, Dillard, was represented by counsel.¹⁴ Both suspects, however, were permitted to question Phillips, although apparently only Dillard did so.¹⁵

At trial, the state proved that Phillips had relocated to California with no plans to return to Texas, and offered his preliminary examination testimony.¹⁶ The crime, the arrest, and the examination took place before *Gideon v. Wainwright* was decided.¹⁷ While Pointer's trial date is not clear, it is clear that he had counsel at trial who objected to the use of the preliminary testimony on Confrontation Clause grounds.¹⁸ The state courts rejected this claim on the theory that the preliminary examination was not a critical stage of the prosecution.¹⁹ Reserving the right to counsel issue,²⁰ the Supreme Court, per Justice Black, held that the Fourteenth Amendment incorporates the Sixth Amendment Confrontation Clause, and that use

¹⁰ See Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1014 (1998) (federal courts' common law evidence power explains dearth of Confrontation cases before incorporation).

¹¹ See *Shepard v. United States*, 290 U.S. 96, 99–100 (1933); *Donnelly v. United States*, 228 U.S. 243, 273–76 (1913).

¹² 380 U.S. 400, 407–08 (1965).

¹³ *Id.* at 401.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Fourteenth Amendment makes the Sixth Amendment's guarantee of right to counsel obligatory upon the states); *Pointer v. State*, 375 S.W.2d 293, 294 (Tex. Crim. App. 1964).

¹⁸ See *Pointer*, 380 U.S. at 401 (stating that Pointer's counsel objected to introduction of the examination transcript as "denial of the confrontation of the witnesses against the Defendant.").

¹⁹ See *Pointer*, 375 S.W.2d at 295 ("The examining trial was held prior to return of the indictment against appellant and was not a part of the trial in which he was convicted.").

²⁰ See *Pointer*, 380 U.S. at 402 ("In this Court we do not find it necessary to decide one aspect of the question petitioner raises, that is, whether failure to appoint counsel to represent him at the preliminary hearing unconstitutionally denied him the assistance of counsel with the meaning of *Gideon v. Wainwright*.").

at Pointer's trial of testimony that had not been subject to cross-examination by counsel violated the Confrontation Clause.²¹

Incorporation meant that the fifty state systems of evidence law were vulnerable to constitutional challenge in federal court. As state defendants began raising such claims, the Justices faced a steady stream of Confrontation Clause cases.²² A majority of the Court soon recoiled from the prospect of constitutionalizing the law of criminal evidence, but failed to explain the precise relationship between the Sixth Amendment right and the hearsay rules.²³

The most radical interpretation was one suggested by John Henry Wigmore,²⁴ and briefly endorsed by Justice Harlan:²⁵ the clause applies only to "witnesses" and not to out-of-court declarants. On this reading, the clause requires cross-examination of witnesses who appear at trial, and no more. This reading would have preserved state autonomy over evidence law, but only by disregarding the federal precedents construing the clause, as well as putting a positive premium on using hearsay rather than testimony. The Court did not follow Wigmore's course, although it would take decades before a majority clearly rejected this possibility.²⁶

²¹ See *Pointer*, 380 U.S. at 406 ("We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that that guarantee . . . is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'") (citation omitted); *Id.* ("Under this Court's prior decisions, the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case.").

²² See Friedman, *supra* note 10, at 1014 ("When the Court held the Clause applicable to the states . . . some out-of-court statements became inadmissible as a matter of federal constitutional law against defendants in state prosecutions. It therefore became important for the Court to develop a theory of the Confrontation Clause.") (footnote omitted).

²³ See, e.g., *Idaho v. Wright*, 497 U.S. 805, 814 (1990) ("Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements.") (citing *California v. Green*, 399 U.S. 149, 155-56 (1970), *Dutton v. Evans*, 400 U.S. 74, 86 (1970), and *United States v. Inadi*, 475 U.S. 387, 393 n.5 (1986)).

²⁴ See JOHN HENRY WIGMORE, 5 A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 131 (3d ed. 1940) ("The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially,—this depends on the law of Evidence for the time being,—but only what mode of procedure shall be followed—i.e. a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially.") (footnote omitted).

²⁵ See *Dutton*, 400 U.S. at 94-96 (Harlan, J., concurring) (endorsing the Wigmore position).

²⁶ See *White v. Illinois*, 502 U.S. 346, 353 (1992) (argument that Confrontation Clause permits any use of hearsay statements except accusatory affidavits "comes too late in the day"). *Crawford* confined the application of the clause to testimonial hearsay, but nonetheless rejected Wigmore's reductionist view that the clause has no application to hearsay at all. See *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004) ("[W]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'") (citations omitted).

Instead, the Court began to recognize safe harbors for prosecution hearsay. In 1970, *California v. Green* recognized two such safe harbors.²⁷ First, if the declarant testifies and is subject to cross-examination at trial, the prosecution's use of declarant's pretrial statements does not implicate the clause.²⁸ Second, if the defendant had an opportunity to cross-examine declarant when the prior statements were made, the clause permits use of pretrial statements if declarant becomes unavailable.²⁹

The Court attempted to formulate a general Confrontation Clause doctrine in *Ohio v. Roberts*.³⁰ Roberts was accused, among other offenses, of the unauthorized use of a credit card in the name of Bernard Isaacs. Roberts claimed Isaacs's daughter, Anita, authorized his use of the card. The state procedure required an evidentiary hearing to be held following arrest but before indictment. The purpose of the hearing was for a judge to make a preliminary finding of probable cause. Following the state's evidence, defense counsel, who had seen Anita in the courthouse hallway, called her as a witness. She testified that she had permitted Roberts to stay at her apartment but denied authorizing him to use the credit card.³¹

At trial, the state offered Anita's preliminary hearing testimony that was elicited by defense counsel, after showing that Anita's whereabouts were unknown and that repeated subpoenas delivered to her Ohio address had produced no response. The trial court admitted the hearsay, but the Ohio Supreme Court reversed Roberts's conviction. The probable cause issue presented at a preliminary hearing, said the Ohio Court, is substantially different than the issue at trial of guilt beyond reasonable doubt.

The Supreme Court in turn reversed, and in the process set forth the following general approach:

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay

²⁷ 399 U.S. 149, 168, 170 (1970).

²⁸ See *id.* at 164 (trial witness "may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial").

²⁹ See *id.* at 166 (when preliminary hearing testimony would be admissible as former testimony if declarant dies before trial, preliminary hearing testimony is also admissible when state produces declarant at trial).

³⁰ For facts and procedural history, please see *Ohio v. Roberts*, 448 U.S. 56, 58–61 (1980).

³¹ See *Roberts*, 448 U.S. at 58 ("Defense counsel questioned Anita at some length and attempted to elicit from her an admission that she had given respondent checks and the credit cards without informing him that she did not have permission to use them. Anita, however, denied this.").

exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.³²

Applying this test, the Court held that Anita Isaacs was unavailable at trial and that her vigorous questioning by defense counsel at the preliminary hearing satisfied the indicia of reliability requirement.³³

To avoid the complete federalization of criminal hearsay law, the Court read *Roberts* to categorically approve “firmly rooted” hearsay exceptions,³⁴ and to require unavailability analysis as a constitutional matter only when the hearsay exception in traditional form did the same.³⁵ If the prosecution offered hearsay evidence under a novel exception, *Roberts* required a case-by-case assessment of reliability.³⁶ Relying on the “firmly rooted” prong of the doctrine, the Court categorically rejected constitutional challenges to statements offered under the co-conspirator statements³⁷ and the statements-for-medical-diagnosis exceptions.³⁸ Statements admitted under the exception for declarations against penal interest³⁹ and the residual or catch-all exception⁴⁰ were tested on a case-by-case basis. *Roberts* drew criticism for both illegitimacy and indeterminacy, and it became apparent that many of the justices were willing to reconsider the Confrontation Clause from the ground up.⁴¹

³² *Id.* at 66 (citations and footnote omitted).

³³ *See id.* at 70–75.

³⁴ *See Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (*Roberts* requires “no independent inquiry into reliability” for evidence within firmly rooted exceptions).

³⁵ *See White v. Illinois*, 502 U.S. 346, 357 (1992) (Confrontation Clause does not bar admission of spontaneous statements and statements made for medical diagnosis and treatment because of the evidentiary value and reliability of such statements, as well as the cost of establishing a generally applicable unavailability rule).

³⁶ *See Lilly v. Virginia*, 527 U.S. 116, 124–25 (1999) (plurality opinion) (reliability is established either by application of a firmly rooted exception, or when statements admitted under a novel exception contain “‘particularized guarantees of trustworthiness’ such that adversarial testing would be expected to add little, if anything, to the statements’ reliability” (quoting *Roberts*, 488 U.S. at 66)).

³⁷ *United States v. Inadi*, 475 U.S. 387, 400 (1986) (“[W]e continue to affirm the validity of the use of co-conspirator statements, and we decline to require a showing of the declarant’s unavailability as a prerequisite to their admission.”).

³⁸ *White v. Illinois*, 502 U.S. 346, 355–57 (1992).

³⁹ *See Lilly*, 527 U.S. at 125–39.

⁴⁰ *See Idaho v. Wright*, 497 U.S. 805, 819–20 (1990) (statements offered under catch-all exception must bear circumstantial indicia of reliability that make cross-examination of marginal value; the relevant circumstances are only those that surround the defendant’s making of the statement).

⁴¹ *See, e.g., Lilly*, 527 U.S. at 140 (Breyer, J., concurring) (noting criticisms of *Roberts*).

B. Crawford

Michael Crawford and his wife Sylvia confronted Kenneth Lee about Lee's alleged attempt to rape Sylvia.⁴² During this confrontation Michael Crawford stabbed Lee. Police arrested Michael and administered *Miranda* warnings to both Michael and Sylvia. Sylvia's statement cast doubt on Michael's claim of self-defense. At Michael's trial for armed assault, Washington's version of the marital privilege made Sylvia unavailable to testify. The prosecution offered her taped statement to police under the hearsay exception for statements contrary to penal interest. The trial court admitted the evidence, rejecting Crawford's constitutional objection after finding the statement reliable under *Roberts*. On appeal the Supreme Court of Washington upheld Crawford's conviction. Crawford then sought review from the U.S. Supreme Court, arguing that *Roberts* "strays from the original meaning of the Confrontation Clause."⁴³

The majority, per Justice Scalia, agreed to replace the *Roberts* test.⁴⁴ Under the new approach, a court considering prosecution hearsay must first characterize the hearsay statement as "testimonial" or "nontestimonial":⁴⁵

An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.⁴⁶

Classifying Sylvia's statement to the police as testimonial, the Court laid out the second step in the new approach.⁴⁷ If prosecution hearsay is testimonial, it may be admitted only if the declarant is unavailable and the defense had an opportunity to cross-examine the declarant about the statement before trial.⁴⁸

⁴² Crawford v. Washington, 541 U.S. 36, 38–42 (2004). For facts and procedural history, see *id.*

⁴³ *Id.* at 42.

⁴⁴ *Id.* at 68–69.

⁴⁵ *Id.* at 68.

⁴⁶ *Id.* at 51.

⁴⁷ *Id.* at 61.

⁴⁸ See *id.* at 53–54 (stating that "[t]he historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination").

C. Davis and Hammon

The *Crawford* Court left open two huge questions: the precise meaning of “testimonial,”⁴⁹ and the precise legal treatment appropriate for statements that are not testimonial.⁵⁰ Opportunities to clarify the new test promptly arose, as *Crawford* issues appeared in hundreds of cases across the country. In *Davis v. Washington*, a domestic battery victim called 911, but the connection broke before anything was said.⁵¹ The 911 operator, trained to return the call, called back, and “Michelle McCottry answered. In the ensuing conversation, the operator ascertained that McCottry was involved in a domestic disturbance with her former boyfriend Adrian Davis.”⁵² When police arrived, they observed fresh injuries on her face and arms. At trial, McCottry did not testify and the trial court classified her as unavailable. The police testified as to their observations, but the only evidence directly identifying Davis as McCottry’s assailant was the tape of her conversation with the 911 operator.

In *Hammon v. Indiana*, police responded to a report of a domestic disturbance at the home of Amy and Hershel Hammon.⁵³ Once out of Hershel’s presence, Amy accused Hershel of beating her and wrote out an affidavit describing the attack.⁵⁴ Amy was under subpoena but did not appear at the trial.⁵⁵ The trial court admitted the officer’s testimony about Amy’s oral statements accusing Hershel, as well as the affidavit.⁵⁶ The hearsay rule was satisfied by Indiana’s expansive exceptions for present-sense impressions and excited utterances, and the Confrontation Clause objection was fended off by classifying the statements as nontestimonial. The Indiana Supreme Court upheld Hershel Hammon’s conviction, agreeing with the trial court with respect to testimony about Amy’s oral statements.⁵⁷ The court concluded that the affidavit was testimonial under

⁴⁹ See *id.* at 51–52 (“Various formulations of this core class of ‘testimonial’ statements exist . . .”).

⁵⁰ See *id.* at 53 (“[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object . . .”).

⁵¹ 547 U.S. 813, 817 (2006). For facts and procedural history, see *id.* at 817–19.

⁵² *Id.* at 817.

⁵³ *Id.* at 819.

⁵⁴ *Id.* at 820 (“Broke our Furnace & shoved me down on the floor into the broken glass.”).

⁵⁵ *Id.*

⁵⁶ See *id.* (stating that “the trial court admitted the affidavit as a ‘present sense impression,’ and Amy’s statements as ‘excited utterances’”) (citations omitted).

⁵⁷ See *id.* at 821 (stating that the Indiana Supreme Court concluded that “Amy’s statement was admissible for state-law purposes as an excited utterance” and “was not ‘testimonial.’”) (citations omitted).

Crawford, but given the admissibility of the oral statements and the fact that the case was tried to the court rather than a jury, the error was harmless.⁵⁸

Again speaking through Justice Scalia, the Supreme Court issued three holdings in these two cases. First, the Court held that McCottry's 911 conversation was not testimonial: "the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*."⁵⁹

Second, the Confrontation Clause applies only to testimonial hearsay. "A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter."⁶⁰ It followed that the conviction of Davis, based on the 911 call classified as nontestimonial, must be upheld.

Third, Amy Hammon's statements to police at her home, accusing Herschel of assault, were testimonial. "Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime"⁶¹ The defense never had an opportunity to cross-examine Amy Hammon. The two exceptions to the cross-examination requirement recognized in *Crawford*—dying declarations and forfeiture by wrongdoing—did not apply. *Crawford* therefore required reversing Hammon's conviction.

The only dissenting voice belonged to Justice Thomas, who would have held Amy Hammon's statements to police nontestimonial.⁶² Chief Justice Rehnquist and Justice O'Connor had defended the *Roberts* test in *Crawford*, but their replacements, Chief Justice Roberts and Justice Alito, followed the precedent set in *Crawford*.

More remarkable than agreement on the holdings is the unanimity about the interpretive method. *All* of the justices agree that the original understanding of the Sixth Amendment ought to guide its meaning, and that when the text is unclear, the original understanding can be gleaned from founding-era practice.⁶³ *Crawford* does criticize *Roberts* as indeterminate, but pragmatic considerations appear very late in the opinion and are quickly cabined: "The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit

⁵⁸ See *id.* (stating that the Indiana Supreme Court "concluded that, although the affidavit was testimonial and thus wrongly admitted, it was harmless beyond a reasonable doubt, largely because the trial was to the bench.").

⁵⁹ *Id.* at 828.

⁶⁰ *Id.* at 824.

⁶¹ *Id.* at 830.

⁶² See *id.* at 840 (Thomas, J., concurring and dissenting) ("Neither the 911 call at issue in *Davis* nor the police questioning at issue in *Hammon* is testimonial under the appropriate framework.").

⁶³ As the Indiana Supreme Court observed in *Hammon*, "No Justice objected to this [historical] methodology." *Hammon v. State*, 829 N.E.2d 444, 450 (Ind. 2005).

core testimonial statements that the Confrontation Clause plainly meant to exclude.”⁶⁴

III. *CRAWFORD*’S COST

To put the serious costs of the new regime in context, we can compare the effect of the Confrontation Clause with the effect of the Fourth Amendment exclusionary rule. Defenders of the Fourth Amendment exclusionary rule and the *Miranda* rules have pretty thoroughly discredited the claim that those doctrines result in “the release of countless guilty criminals.”⁶⁵ Exclusion of evidence on Fourth or Fifth Amendment grounds is very rare, concentrated in less serious cases, and often does not prevent the conviction of the offender.⁶⁶ Nonetheless, a majority of the justices continue to bemoan the heavy cost of the exclusionary rule. For example, Justice Scalia, the midwife of *Crawford*, took pains to note that the Court has “repeatedly emphasized that the [exclusionary] rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.”⁶⁷

The number of factually-justified prosecutions for violent crime lost as a result of *Crawford* exceeds the number lost as a result of the Fourth Amendment exclusionary rule many times over. For example, Professor Lininger reports that:

within days—even hours—of the *Crawford* decision, prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented little difficulty in the past. For example, during the summer of 2004, half of the domestic violence cases set for trial in Dallas County, Texas, were dismissed because of evidentiary problems under *Crawford*.⁶⁸

Even before *Crawford*, victim noncooperation was the biggest barrier to successful prosecutions. The studies showed wide variations in the conviction rates. One “analysis of 85 domestic violence prosecution studies found an overall

⁶⁴ *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

⁶⁵ The phrase, now rather notorious, comes from *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

⁶⁶ See, e.g., Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 11–12 (2001):

[P]ointing to a mass of empirical work done during the seventies and eighties, defenders of exclusion point out that evidence is rarely suppressed on constitutional grounds. Even when evidence is suppressed, convictions still frequently result based on untainted evidence. Lost cases only rarely involve murder or rape, but are concentrated in drug cases.

(footnotes omitted).

⁶⁷ *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (citations omitted).

⁶⁸ Lininger, *supra* note 2, at 749–50 (footnotes omitted).

conviction rate of 35%, ranging from a low of 8.1% of 37 cases in Milwaukee between 1988 and 1989 to a high of 90.1% in Brooklyn of 229 cases prosecuted in 1997.”⁶⁹ These numbers, however, reflect the success rate of prosecutions; it is probable that prosecutors also decline meritorious cases because of anticipated evidentiary problems.

Jury skepticism is not, as it is in rape cases, a major cause of nonconviction: the studies show conviction rates at trial are over 90%.⁷⁰ Instead, the obstacle to prosecution is dismissal for lack of evidence. “Generally, lack of cooperative or available victims are cited as the prime reasons prosecutors drop or dismiss domestic violence cases.”⁷¹ The most significant cause of victim noncooperation, not surprisingly, is fear of the abuser.⁷²

It is not impossible to obtain convictions without the victim’s cooperation. There may be physical evidence of abuse, such as crime-scene photographs or medical testimony. The suspect may make incriminating statements. Third-party witnesses may have seen (or heard) the abuse. The prosecution may be able to prove forfeiture by wrongdoing. By exploiting these types of proof, specialized prosecution units can achieve high conviction rates under “no-drop” policies.⁷³

To say that *some* domestic violence cases *can* be prosecuted successfully *if* the jurisdiction makes a *major* investment, however, is simply to restate the costs of *Crawford*. Police time interviewing witnesses, taking photographs, and interrogating the suspect is police time taken away from other cases. The same is true of prosecutorial resources invested in specialized prosecution offices. *Crawford* has made it substantially more difficult and more costly to prosecute domestic violence cases in the face of victim noncooperation.

The Court offers two counters to the obvious law enforcement costs of the new doctrine. The first is the proposition that testimonial hearsay is not reliable.⁷⁴ Second, it is said that when witness intimidation occurs, the government can invoke the forfeiture by wrongdoing exception.⁷⁵

The reliability point would be cogent, indeed decisive, if admitting uncross-examined testimonial hearsay were likely to induce false convictions. Under *Roberts*, prosecution hearsay had to fit within a reliable exception—exceptions

⁶⁹ ANDREW R. KLEIN, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH, PART II: PROSECUTION 42 (2008).

⁷⁰ *See id.*

⁷¹ *Id.* at 52 (reviewing studies).

⁷² *Id.* at 46.

⁷³ *Id.* at 55. Much of the data showing successful prosecutions in no-drop jurisdictions, it should be noted, was gathered pre-*Crawford*.

⁷⁴ *See Crawford v. Washington*, 541 U.S. 36, 61 (2004) (clause requires “that reliability be assessed . . . by testing in the crucible of cross-examination”).

⁷⁵ *See Davis v. Washington*, 547 U.S. 813, 833 (2006) (“We reiterate what we said in *Crawford*: that ‘the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.’” (citation omitted)).

typically available to the defense in criminal cases and to civil litigants. Moreover, the *Crawford* trilogy itself provides for sweeping admissibility of *nontestimonial* statements, without any inquiry into reliability.⁷⁶

In *Whorton v. Bockting*, the Court unanimously agreed that *Crawford* does not apply retroactively.⁷⁷ Justice Alito's opinion frankly states that "*Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials."⁷⁸ With no apparent sense of irony, Justice Alito's opinion in *Bockting* distinguishes *Crawford* from *Gideon* (which was given retroactive effect) based on *Gideon*'s more pervasive contributions to instrumental reliability.⁷⁹

Juries are free to disbelieve hearsay, and trial courts backstop the jury with rulings on sufficiency of the evidence. The empirical evidence on the jury's ability to evaluate hearsay is inconclusive, but it casts serious doubt on the claim that juries are prone to over-valuing hearsay.⁸⁰ Professor Friedman, perhaps *Crawford*'s most formidable proponent, concedes that "[t]he empirical evidence does not reveal over-valuation of hearsay and even suggests the possibility of under-valuation."⁸¹ On one point the empirical evidence is clear and convincing: lay people are poor judges of credibility based on demeanor.⁸² If jurors make poor use of hearsay, it is not because they make good use of testimony in their presence.

⁷⁶ This is a result Professor Mosteller has recently acknowledged—and cogently criticized. See Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford's Birth Did Not Require That Roberts Had to Die*, 15 J.L. & POL'Y 685, 700–01 (2007).

⁷⁷ 549 U.S. 406, 415–21 (2007).

⁷⁸ *Id.* at 419.

⁷⁹ See *id.*

⁸⁰ Professor Park summarizes the available studies as follows:

The published experiments seem to reach inconsistent results about the impact of hearsay. In three of the experiments, jurors deeply discounted the hearsay, and were much less likely to return guilty verdicts than jurors who had viewed live testimony on the same point. In three experiments, hearsay had an impact similar to that of live testimony, and much greater than that of the condition in which there was no testimony on the point. In one experiment, jurors gave hearsay testimony greater weight than live testimony.

Roger C. Park, *Visions of Applying the Scientific Method to the Hearsay Rule*, 2003 MICH. ST. L. REV. 1149, 1152 (footnotes omitted).

⁸¹ Richard D. Friedman, *Minimizing the Jury Over-Valuation Concern*, 2003 MICH. ST. L. REV. 967, 976. Professor Friedman refers to the over-valuation account of the hearsay rule as "rubbish." *Id.*

⁸² See Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1158–59 (1993) (discussing unjustified popular confidence in demeanor evidence); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991) (reviewing studies). Some evidence now suggests that in some specific contexts, observers may detect cues for deceptiveness. See Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2557

DNA testing led to the exoneration of convicted suspects and thereby gave birth to a wave of research on false convictions. The sorry upshot of that research is that the leading causes of false convictions remain what they were in the 1930s: mistaken identification, official misconduct, and ineffective defense representation.⁸³ Perjury, whether suborned or merely accepted by the prosecution, poses a serious risk to the innocent despite cross-examination at trial. None of the studies of false convictions point to prosecution hearsay as a major risk.⁸⁴

Crawford, then, has made it significantly more difficult to convict the guilty, without improving the chances of vindicating the innocent. Of course an arbitrary preference for the defense will protect some innocents by chance. If one regards prevailing sentences as excessively harsh, any right of defense that can be traded via plea bargaining for lower sentences may seem attractive (although this seems a far less plausible position in domestic violence cases than, in, say, drug cases). If we leave these speculative contingencies aside, *Crawford* has set back the quest for rational adjudication. Understandably, the lower courts have sought ways to reduce the costs of the new doctrine. The Court, however, has so far given such efforts a cold shoulder.

IV. FAILED COPING STRATEGIES: MINIMIZING THE TESTIMONIAL CATEGORY AND FORFEITURE BY WRONGDOING

A. Minimizing the “Testimonial” Category

The most obvious coping strategy, exemplified by Justice Thomas’s dissenting opinion in *Hammon*, is to restrict the category of “testimonial” hearsay. Pushed far enough, this strategy could come very close to the reductionist position taken by Wigmore. If the clause applies only to testimony, then anything that is not testimony is not covered.

There are two reasons why this strategy is unpromising. The first is that the Court already has rejected it: *Hammon* holds that an unsworn statement to police shortly after the crime nonetheless is testimonial.⁸⁵ True enough, under *Davis*

(2007). As a generalization, however, lay evaluation of demeanor does not appear to be an effective screen against false accusations.

⁸³ See Peter Neufeld & Barry C. Scheck, *Foreword* to EDWARD CONNORS ET AL., U.S. DEP’T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, at xxx (1996) (“Mistaken eyewitness identification, coerced confessions, unreliable forensic laboratory work, law enforcement misconduct, and ineffective representation of counsel, singly and often in combination, remain the leading causes of wrongful convictions.”).

⁸⁴ See *id.* (summarizing causes of false convictions without mentioning hearsay). The Innocence Project’s website summarizes the causes of false convictions exposed by subsequent DNA exonerations. The site does not mention unreliable hearsay as a factor in any of the cases. See Innocence Project—Understand the Causes, <http://www.innocenceproject.org/understand/> (last visited Mar. 31, 2010).

⁸⁵ See *Davis v. Washington*, 547 U.S. 813, 829–30 (2006).

most statements made to private persons and even government agents who are not law enforcement officers will not be testimonial. The limiting factor, however, inheres in the testimonial category. We have police investigations precisely because we need them. Henceforth the police may interview witnesses for their own purposes, but no matter how reliable, witness statements to the police will not be admissible at trial if the declarant does not testify.

The Court's most recent *Crawford* decision, *Melendez-Diaz v. Massachusetts*, reflects a strong commitment to a principled application of the testimonial-hearsay concept.⁸⁶ The defense challenged the admission of sworn certificates executed by laboratory technicians offered to prove that the substance Melendez-Diaz allegedly distributed was cocaine.⁸⁷ Again speaking through Justice Scalia, the majority rejected the claim that the hearsay was not testimonial, as well as the state's arguments that an exception should be recognized for routine scientific tests.⁸⁸ Justice Kennedy's dissent was joined by the Chief Justice, Justice Alito, and Justice Breyer, a numerical sign that the law enforcement costs of *Crawford* are starting to sink in.⁸⁹ As things stand, however, the Court has taken a firm and relatively robust approach to the testimonial hearsay category.

The other reason to reject coping strategies based on restricted readings of "testimonial" is that such a reading might endanger the innocent. Perversely, the more steps that are taken to promote the reliability of an out of court statement, the more likely it will be to be classed as testimonial. As a result, efforts to develop "nontestimonial" statements during investigations have chances of success that vary inversely with the reliability of the statements they generate.⁹⁰ For example, by taking a sworn statement from Amy Hammon, the police took an obvious step to improve reliability, but this very step made the testimonial classification ineluctable.

Government agents who scrupulously aim to develop a reliable evidentiary record will end up taking steps that cause the courts to treat the resulting record as testimonial. *Crawford* may tempt legislators to create new hearsay exceptions, and trial judges to push the envelope of the catch-all exception. Appellate courts will

⁸⁶ 129 S. Ct. 2527 (2009).

⁸⁷ *Id.* at 2531.

⁸⁸ *Id.* at 2532.

⁸⁹ *Id.* at 2543.

⁹⁰ *Crawford* makes this point, albeit perversely, when the opinion notes that under *Roberts* some courts had found the formal trappings of testimonial hearsay, such as recording, the oath, and the perjury requirement, to be factors enhancing the reliability of the statement. *Crawford v. Washington*, 541 U.S. 36, 65 (2004) ("To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial."). Given the assumption that the Confrontation Clause makes an otherwise normatively rootless commitment to cross-examination, this statement is quite correct. If, however, we adopt the contrary assumption, that the clause makes a commitment to rational procedure normatively rooted in protecting the innocent, it is the holding of *Crawford* rather than of *Roberts* that "adds insult to injury."

then face the choice of betraying the holding of *Hammon* or insisting that only hearsay devoid of formal procedural safeguards be admitted. The unappetizing nature of the choice should direct us to consider other coping strategies.

There is one really promising avenue for the government to exploit *Davis*'s holding that the Confrontation Clause has no application to nontestimonial statements. The approach, however, is distinctly unsavory. If police believe that a domestic violence victim, or a witness in an organized crime case, will be unwilling to testify at trial, they might try to develop proof of what the witness says in casual, i.e., nontestimonial conversations. Undercover agents, wearing hidden recording equipment or feigning sympathy in internet chat rooms, might bait the victim into admitting the truth. Given probable cause to believe that the witness might say something useful in a telephone conversation, perhaps a wiretap order might be possible.

The defects in such an approach are obvious. The government would invade the victims' privacy, and the hearsay statements so generated would not be subject to cross-examination. Public knowledge of a surveillance policy would inhibit initial reporting further. Perhaps worst of all, police and prosecutors might collude with victims, arranging for them to tell their stories in conversations presented to the court as causal and spontaneous but that were in reality carefully orchestrated. Whether the cost of targeting victims for undercover surveillance is worth the benefits is debatable. It seems reasonably clear, however, that absent collusion, statements obtained in this way would not be subject to Confrontation Clause scrutiny after *Davis*. The prosecution would need a hearsay exception, but the absence of constitutional review opens the door for legislatures to craft new exceptions, and for trial judges to take an expansive view of the well-established catch-all exception.

B. *Exploiting the Forfeiture by Wrongdoing Doctrine*

Crawford's approval of the forfeiture by wrongdoing doctrine confirms the seriousness of the problem without offering a practical remedy. Forfeiture by wrongdoing depends on proof by a preponderance of the evidence⁹¹ that the accused had a hand in silencing the witness. Even before *Crawford*, some lower courts pressed the envelope of the forfeiture doctrine by imputing witness tampering to the accused on the basis of the *Pinkerton* doctrine, holding conspirators complicit in foreseeable but unplanned crimes by their confederates.⁹²

⁹¹ This standard assignment of the proof burden comes from *Davis v. Washington*, 547 U.S. 813, 833 (2006), but it is important to note that the Court did not hint that this particular arrangement is constitutionally required. See *id.* ("We take no position on the standards necessary to demonstrate such forfeiture . . .").

⁹² See *United States v. Cherry*, 217 F.3d 811, 818 (10th Cir. 2000) (holding that forfeiture doctrine applies when D would be complicit, under *Pinkerton*, in the crimes committed to silence the witness). The Seventh Circuit has approved of the *Cherry* doctrine. *United States v. Thompson*, 286 F.3d 950, 955 (7th Cir. 2002).

The *Pinkerton* approach is plausible in gang cases, but has no apparent application in domestic violence cases. Even in gang cases it depends on proof that associates of the accused reached the witness. In some factual contexts, the gangsters may achieve their goals by obliging the witness to testify untruthfully rather than refuse to testify altogether, and forfeiture by wrongdoing has no application when the witness in fact takes the stand at trial.

After *Crawford*, some courts approved the concept of “reflexive” forfeiture, i.e., forfeiting confrontation rights based on wrongs, like heat of passion homicide, that were not motivated by the desire to silence the victim as witness.⁹³ The Court, however, squarely rejected this doctrine in *Giles v. California*.⁹⁴ Again speaking through Justice Scalia, the majority relied on founding-era understanding of the dying-declaration exception.⁹⁵ If D forfeits his objection to the admission of V’s statement by acting, before the statement, to cause V’s death, the dying-declaration exception’s limits are irrelevant. If, for instance, in the famous *Shepard* case,⁹⁶ the trial court concluded by a preponderance of the evidence that the defendant was guilty, then Mrs. Shepard’s statements would have been admissible on a forfeiture theory. The dying-declaration exception does not sweep so far, and did not do so in the founding era.⁹⁷ Ergo the Court’s approval of the dying-declaration exception on purely historical grounds excludes, on historical grounds, the doctrine of reflexive forfeiture.⁹⁸

There is another reason, unstated by the majority, for insisting, as does FRE 804(b)(6), on a motive to silence. That reason is that a motive to silence is probative of the truth of the witness’s story. A rational trier might well interpret the defendant’s improper pressure on the witness, like flight⁹⁹ or spoliation of

⁹³ See *People v. Giles*, 152 P.3d 433, 435 (Cal. 2007) (upholding forfeiture based on same murder charged); *State v. Meeks*, 88 P.3d 789, 793–94 (Kan. 2004) (holding that D’s murder of V during a street altercation, proved by a preponderance to the court, forfeits D’s Confrontation Clause objection).

⁹⁴ 128 S. Ct. 2678, 2693 (2008).

⁹⁵ *Id.*

⁹⁶ *Shepard v. United States*, 290 U.S. 96 (1933).

⁹⁷ See *Mattox v. United States*, 146 U.S. 140, 145, 151–52 (1892). Note that the belief-in-impending-death requirement, and the limitation of the exception to homicide cases, would be completely swallowed up by the forfeiture doctrine if homicide *per se* forfeited rights under the Confrontation Clause.

⁹⁸ See *Giles*, 128 S. Ct. at 2685 (“Many other cases excluded victims’ statements when there was insufficient evidence that the witness was aware he was about to die. Courts in all these cases did not even consider admitting the statements on the ground that the defendant’s crime was to blame for the witness’s absence—even when the evidence establishing that was overwhelming.”) (citations omitted).

⁹⁹ Cf. *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000) (flight from police is a factor supporting reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968)).

evidence,¹⁰⁰ as reflecting consciousness of guilt. This point cuts against expanding forfeiture-by-proxy by analogy to the *Pinkerton* doctrine. Corrupt pressure brought by third parties do not, as do pressures brought by or at the behest of the accused himself, support an inference that the accused knows himself to be guilty as charged. In sum, the most obvious approaches to containing the costs of *Crawford* have, at most, limited promise.

V. THREE PROPOSALS

As *Bockting* frankly acknowledged, *Crawford* is premised on a supposed constitutional command rather than a contemporary assessment of competing interests. A majority of the justices have reaffirmed that supposed command in five cases now: *Crawford*, *Davis*, *Hammon*, *Giles*, and *Melendez-Diaz*. Something like *Roberts* will return in time (constitutional precedent ain't what it used to be), and history may judge those responsible for the *Crawford* regime rather harshly. These, however, are distant prospects. The immediate task is to survey what might be done, legislatively and administratively, to reduce the toll of the now-established constitutional regime.

A. *The First Proposal: Permitting Substantive Use of Prior Statements by Testifying Witnesses*

The first of the three reforms I propose is adoption of the California rule¹⁰¹ making *any* prior inconsistent statement, whether cross-examined or not, admissible as substantive evidence in criminal cases.¹⁰² Under the Federal Rules and many of their state counterparts, only statements made at a "proceeding" such as a preliminary hearing or before the grand jury are admissible to prove truth.¹⁰³

¹⁰⁰ Cf. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995) ("Under the spoliation of evidence rule, an adverse inference may be drawn against a party who destroys relevant evidence.").

¹⁰¹ See CAL. EVID. CODE §1235 (West 2009).

¹⁰² The proposal is at least as old as the rule originally proposed by the Supreme Court. Other commentators have pointed to the need for amending the rule in domestic violence cases. See Douglas E. Beloof & Joel Shapiro, *Let the Truth be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 10 (2002), particularly in light of *Crawford*. See also Andrew King-Ries, *An Argument for Original Intent: Restoring Rule 801(d)(1)(A) to Protect Domestic Violence Victims in a Post-Crawford World*, 27 PACE L. REV. 199 (2006). Professor King-Ries supports a return to the rule proposed by the Supreme Court, while I suggest limiting the change to the criminal context. This would avoid needless controversy at the rule-drafting stage. Since there does not seem to be disquiet with the functioning of the rule on the civil side, where depositions typically satisfy the 801(d)(1)(a) requirements, and where the preponderance standard makes it much easier to take the case to the jury, the limitation makes policy sense as well.

¹⁰³ See FED. R. EVID. 801(d)(1). Professor King-Ries summarizes current state practice as follows:

In these jurisdictions, when V, moved by love, fear, or both, swears at trial that "I fell down the stairs" or "a stranger beat me up," her statement to police accusing her husband or boyfriend is admissible to impeach, but not to take the case to the jury on the issue of guilt. The Supreme Court upheld the broader rule of admissibility against Confrontation Clause attack in *California v. Green*, reasoning that when declarant testifies at trial, the defense retains a meaningful right of confrontation.¹⁰⁴ The Court has made clear that *Green* survives *Crawford*.¹⁰⁵

Draft language for an appropriate amendment to the Federal Rules is as follows:

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is—

(A) inconsistent with the declarant's testimony *in a criminal case; or inconsistent with the declarant's testimony in a civil case* and was given under oath subject to the penalty for perjury at a trial, hearing, or other proceeding, or in a deposition.

The proposed amendment adopts, for criminal cases, the rule originally proposed by the Supreme Court.¹⁰⁶ The Senate approved the rule as proposed, but the House balked, out of concern for the reliability of the former statement. This concern is misplaced. Unsworn prior inconsistent statements are admissible to impeach, and in the usual case where there is enough evidence to take the case to the jury, no one believes that the jurors follow the instruction to use the prior statement only for credibility. If the unsworn statement were *ipso facto* incredible,

Since Congress adopted Rule 801(d)(1)(A), the vast majority—forty-one—of the states allow some substantive use of prior inconsistent statements. Fourteen states have adopted evidence rules identical to Federal Rule 801(d)(1)(A). In a complete reversal, now at least seven states and the District of Columbia follow the orthodox rule and allow no substantive use of prior inconsistent statements. The remaining states allow some substantive use of prior inconsistent statements, but place reliability requirements on the statements above and beyond testifying under oath at the trial and being subject to cross-examination. Interestingly, one-third of all states rejected Federal Rule 801(d)(1)(A) and have adopted evidence rules similar to the original Supreme Court rule. These seventeen states permit substantive use of prior inconsistent statements when the declarant testifies at trial and is subject to cross-examination. Thus, the majority of jurisdictions refuse to allow substantive use of prior inconsistent statements.

King-Ries, *supra* note 102, at 224–25 (footnotes omitted). My hope would be that a federal amendment would spur more states to adopt the California approach, at least in criminal cases.

¹⁰⁴ 399 U.S. 149, 162 (1970).

¹⁰⁵ See *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) ("Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." (citing *Green*, 399 U.S. at 162)).

¹⁰⁶ For the drafting history of the rule, see King-Ries, *supra* note 102, at 211–24.

we would not trust jurors to hear it at all; their certain use of it for substance, despite contrary instruction, would be too prejudicial.

The primary benefit of such an amendment would be to permit the jury to determine the credibility of the out-of-court accusation and an in-court recantation. There is no reason to inflexibly presume that the sworn statement in court is true simply because it is sworn and in court. Indeed, when the in-court recantation is incredible, as it often is, it reinforces the credibility of the out-of-court accusation. If the most plausible alternative to guilt that the witness can think of is incredible, it follows that guilt is highly probable.

There is at least one further modest advantage of the proposed change. Now, when the calling party impeaches a turncoat witness with an unsworn prior statement, the law requires an awkward inquiry into the prosecutor's good faith, *vel non*, in calling the witness.¹⁰⁷ If the court finds the prosecution called the witness for the purpose of putting the inadmissible hearsay in for substantive use by the jury (after all, the prosecution could utterly nullify the witness's credibility by not calling the witness in the first place), the impeaching statement should be excluded. Interring this last vestige of the common-law "voucher rule" would end the need for this problematic inquiry.

My proposed revision is limited to criminal cases; on the civil side, the routine use of depositions—and the absence of any constitutional limit on appeals to the catch-all exception—make the current FRE 801(d)(1) functional. Moreover, the preponderance standard in civil cases makes it easier to take the case to the jury, before whom the distinction between impeachment and substance loses practical significance. *Crawford* has only made the current rule seriously dysfunctional on the criminal side.

The California rule is practical, costs no money, and offends no obvious interest group. The Supreme Court has reaffirmed long-standing precedent rejecting constitutional challenges to it. There are few "no-brainers" in criminal justice. This is one.

B. Arranging Personal Confrontation of Pretrial Statements

The second proposed amendment is a new FRE 804(B)(5), reading as follows, again with my proposed language in *italics*:

804(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .

¹⁰⁷ See *United States v. Patterson*, 23 F.3d 1239, 1245 (7th Cir. 1994) (stating that the government may not "call a witness that it [knows will] not give it useful evidence, just so it [can] introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence." (citing *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984))); *United States v. Kane*, 944 F.2d 1406, 1411 (7th Cir. 1991) ("Impeachment of one's own witness cannot be permitted where employed as a mere subterfuge to present to the jury evidence not otherwise admissible.").

(5) *A statement (a) that satisfies the requirements for admissibility of Rules 803, 804(b)(2), 804(b)(3), or 807, offered in a criminal case, by a declarant with first-hand knowledge of the facts of the alleged offense, made in the presence of the accused and of a law enforcement officer, at a time when the accused had the opportunity to explain or deny the statement; or (b) that was made by the accused, denying the offense or otherwise responding to any statement admissible under subdivisions (a) of this rule, offered by the defense.*

This proposal takes the historical rationale of the *Crawford* trilogy seriously. *Crawford*'s interpretation of the Confrontation Clause is explicitly originalist: what was the original understanding of the Sixth Amendment regarding the accused's ability to challenge a witness's statements? An examination of the history shows that what the founders meant by confrontation was not cross-examination in court by counsel, as imagined by *Pointer*.¹⁰⁸ Instead, what was understood by the right of confrontation was a statement made in the suspect's presence that the suspect had the right to challenge. Critically, the ability to challenge was personal—there is no evidence that the original right required the participation of defense counsel. As long as the accused himself could look the declarant in the eye, the framers thought the Sixth Amendment was satisfied.

If my reading of history is correct, *Crawford* is inconsistent with its own originalist premise, and more importantly, reads the Confrontation Clause to exclude far more than is necessary. Whatever other value we might place on the presence of counsel at a pre-indictment event where a witness provides information, it is hard to maintain that the Sixth Amendment invariably compels the exclusion of that information if confrontation takes place without a lawyer. As a result, I argue that when the police today obtain a statement from a witness in the presence of the accused, and the accused has a fair chance to challenge that statement, the Confrontation Clause should not bar its later use. The admissibility question should be answered by statutory and evidence law.

1. Use of Pretrial Depositions at Trial: Founding Era Practice

At the time of the founding, arrest was followed by the preliminary examination before a justice of the peace.¹⁰⁹ For the most part, these examinations

¹⁰⁸ See generally *Pointer v. Texas*, 380 U.S. 400 (1965).

¹⁰⁹ The basic procedure was described by 4 WILLIAM BLACKSTONE, COMMENTARIES *293–94 as follows:

WHEN a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace. And how he is there to be treated, I shall next shew, under the second head, of *commitment* and *bail*.

THE justice, before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged: and to this end by statute 2 & 3 Ph. & M. c. 10 he is to take in writing the examination of such prisoner, and the information of

took place immediately after the arrest, before (sometimes weeks before) the return of an indictment by the grand jury.¹¹⁰ In their form, these examinations were altercations between the suspect and his accusers, an altercation that memorialized sworn testimony that could be used at trial if the witnesses were unavailable when the trial came.¹¹¹ The grand jury would proceed in secrecy and trial would take place promptly after indictment, so the examination was the only pretrial opportunity for the accused to confront his accusers and ask questions of them.

It seems fairly clear that the examination procedure did not change with the adoption of constitutional provisions regulating criminal procedure, whether state or federal. Decisions referencing examinations can be found in the early reports of many of the new states, as well as in the federal cases.¹¹² Professor Moglen's extensive canvass of justice of the peace manuals shows that the examination procedure as described on the books did not change from the English model in the years following ratification of the Bill of Rights in 1791.¹¹³ Writing in the 1840s,

those who bring him: which, Mr. Lambard observes, was the first warrant given for the examination of a felon in the English law. For, at the common law, *nemo tenebatur prodere seipsum*; and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men. If upon this enquiry it manifestly appears, either that no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail; that is, put in securities for his appearance, to answer the charge against him.

(antique f replaced with s) (footnote omitted).

¹¹⁰ *Id.*

¹¹¹ On the use of the depositions to conform trial testimony, see JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 41–42 (2003) (discussing eighteenth century English practice).

¹¹² See *United States v. Duffy*, 25 F. Cas. 922 (C.C.D.C. 1804) (No. 14,998) (sworn statement from prisoner at examination not admissible at trial); *State v. Collins*, 2 Del. Cas. 181, 182 (Ct. Quarter Sess. 1803) (discussing sufficiency of proof at trial of confession given before a justice of the peace on examination); *Commonwealth v. Battis*, 1 Mass. 95, 96, 1 Will. 72, 73 (1804) (before accepting guilty plea to capital charge, trial court consulted examining magistrate about defendant's sanity); *State v. Wells*, 1 N.J.L. 424, 492 (Sup. Ct. 1790) (admissions by prisoner on examination do not bar proof of extra-judicial confessions); *State v. Irwin*, 2 N.C. 130, 131–32, 1 Hayw. 112, 113–14 (1794) (parol evidence admissible to prove prisoner's confession to justice of the peace at examination); *State v. Grove*, 1 N.C. 63, 63, 1 Mart. 43, 43 (1794) (parol evidence not admissible to prove confession on examination); statutes require justice of the peace to record depositions in writing within two days of the examination); *Anonymous*, 3 Va. (1 Va. Cas.) 144, 144 (1804) (after statute of 1804, no jurisdiction in trial court to try indictment returned without examination or waiver of examination; after examination, grand jury must return a new indictment before trial can take place); *Commonwealth v. Blakeley*, 3 Va. (1 Va. Cas.) 129, 130 (1800) (prior to statute of 1804 requiring examination or waiver of examination before trial, grand jury could indict and jury could try defendant without examination).

¹¹³ See Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1125 (1994) ("The rudiments of criminal procedure, in particular, continued to be provided to the new nation's local judges by Dalton, Hale, Hawkins, Nelson, or Burn, in their own right or as copied by American 'editors.' Practice may have changed more rapidly than the JP manuals, to be sure, but it should be observed

Simon Greenleaf, in the treatise that would become the standard American authority on evidence, described the procedure very much as Blackstone had more than sixty years before.¹¹⁴

Probably the clearest proof that the founders regarded the examination procedure under the Marian statutes as standard procedure consistent with the constitution is Section 33 of the Judiciary Act of 1789, which reads in part as follows:

*And be it further enacted, That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offence. And copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment.*¹¹⁵

that the JPs themselves were even more durable than the manuals, and, given the broad intrinsic discretion of local Justices, continuity of personnel is an important determinant of continuity of practice.”). See also 3 SIR THOMAS SKYRME, HISTORY OF THE JUSTICES OF THE PEACE 120 (1991) (“The problem of ‘reception’ was one that would plague the new states, but the Justices of the Peace courts after some fits and starts of patriotic fervor settled down, and as new counties were added to the existing states, the simple system of the people’s courts extended to them.”). Professor Nelson notes some evidence suggesting special scruples in Massachusetts about questioning the prisoner during examination. See WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 100–01 (1975). Given the prisoner’s obligation to self-represent during the questioning of the *other* witnesses, the limitation on questioning may be more apparent than real. At any rate, there seems to be no debate that the Marian committal procedure was in use, as the records reported by Nelson show. See also *Battis*, 1 Mass. at 96, 1 Will. at 73 (before accepting guilty plea to capital charge, trial court consulted examining magistrate about defendant’s sanity).

¹¹⁴ 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 261 (1st ed. 1842) (“By [the Marian] statutes, the principles of which have been adopted in several of the United States, the justices, before whom any person shall be brought, charged with any of the crimes therein mentioned, shall take the examination of the prisoner, as well as of the witnesses, in writing, which the magistrate shall subscribe, and deliver to the proper officer of the Court, where the trial is to be had.”) (footnote omitted). Footnote 2 on page 261 references New York, New Jersey, Alabama, Tennessee, North Carolina, Mississippi, and Massachusetts statutes as adopting “the principles” of the Marian statutes. Greenleaf did note that in America, under the constitutional Confrontation Clauses, depositions taken during examination might be used at trial when the deponent was unavailable only if taken in the presence of the prisoner. See *id.* at 13.

¹¹⁵ Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789) (footnote omitted).

Evidently, the drafters thought the process under the Marian statutes was the norm, although the language anticipates possible changes in the states over time. As this was the same Congress that proposed the Bill of Rights to the states, any claim that adherence to pretrial procedure under the Marian statutes conflicts with the original understanding of the Bill of Rights seems dubious.

Virginia seems to have followed a slightly different procedure, one that might have allowed for the participation of defense counsel during the examination of witnesses. When a complaint was brought to a justice of the peace [JP] who deemed it worth pursuing, the JP would convene an examining court composed, like the sessions courts, of all the justices of the peace, to meet no less than five nor more than ten days later to determine whether to bind the prisoner over to the next session of the felony court for consideration by the grand jury.¹¹⁶ Two peculiar structural features of this procedure opened the door for defense counsel: there was a space of days between when the prisoner knew he was accused and when the depositions were taken, and the prisoner himself was examined initially by a single justice, in the absence of counsel. Professor Davies points out at least one JP manual that suggests a role for defense counsel in Virginia's examining courts.¹¹⁷ The Virginia procedure is worth noting, but it does not suggest a general right to counsel at founding-era examinations. The practice seems to have been unique to the Commonwealth, and the decision of the first Congress to direct

¹¹⁶ See 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 300 n.5 (1803), available at <http://www.constitution.org/tb/tb5.htm> ("When any free person is charged before a justice of the peace with any criminal offence, which, in his opinion, ought to be further examined into, he is to take the recognizance of the witnesses to appear at the next county or corporation court, and commit the offender to jail; and moreover issue his warrant to the sheriff or sergeant to summon the justices to hold a court at the courthouse, on a certain day, not less than five, nor more than ten days thereafter, for the examination of the fact; 'which court shall consider, whether as the case may appear to them, *the prisoner may be discharged from further prosecution, may be tried in the county or corporation, or must be tried in the district court.*' If in their opinion the fact may be *tried in the county or corporation*, he may be bound over to the next grand-jury for the county or corporation; and for want of bail they may commit him to jail. If in their opinion the prisoner *ought to be tried in the district court*, they shall take the depositions of witnesses, and their recognizances to appear and give evidence against him at the *trial*; and then, if he be not bailable, any two justices, by warrant under their hands and seals directed to the sheriff or sergeant, may direct him to be removed, and committed to the district jail, there to be safely kept, until discharged by due course of law: but if the prisoner shall in the opinion of the court be bailable by law, they shall enter that opinion in their proceedings, and the sum in which he ought to be bound, and, thereupon, he shall not be removed within twenty days thereafter, but shall and may be admitted to bail, before any justice of the county or corporation within that time, or at any time afterwards, before any judge of the general court, who shall transmit his recognizance to the district court, and give a warrant for the deliverance of the prisoner."'). Apparently the hardship of lengthy detention authorized by a single justice led to the adoption of the examining court as a screening device. See Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937, 940-42 (2003) (describing origins and purposes of the examining court in Virginia).

¹¹⁷ See Thomas Y. Davies, *What Did the Framers Know and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 186-87 (2005) (discussing Hening's 1794 JP manual).

taking examinations in accordance with local state practice points away from any federal constitutional mandate for the Virginia approach. Nor did the examining court procedure include appointed counsel for the indigent. That was not a settled practice even as late as *Pointer* itself.

In the late eighteenth and early nineteenth centuries, the preliminary examination not only served the same functions as the modern preliminary hearing; it also served at least one more: the interrogation of the suspect. The inclusion of interrogation of the prisoner among the functions of preliminary examination makes the suggestion of a right to counsel at this stage rather implausible. True enough, America was ahead of England with respect to defense counsel's role at trial. The greater role of defense counsel in America at trial, however, makes the participation of counsel at examination less, rather than more, likely.

The founding-era authorities say that the prisoner is not compelled to answer questions, and that he is not to be put under oath like other witnesses.¹¹⁸ The examination, however, was the system's best opportunity to get information from the suspect, an opportunity that became more important as more defendants obtained professional representation at trial.¹¹⁹ As defense lawyers began to control the trial process, the "accused speaks" model could survive only if the prisoner had to represent himself during the examination.¹²⁰ A lawyer would do more than question the prosecution's witnesses; he would also shut the mouth of the prisoner by advising assertion of the privilege against self-incrimination. This is exactly what happened when preliminary hearings moved into the courthouse—and the interrogation of the prisoner moved to the police station.¹²¹

¹¹⁸ See Moglen, *supra* note 113, at 1098 ("All sources agreed on three critical points: (1) at the preliminary examination, the defendant was to be questioned unsworn; (2) his statements were to be made a matter of formal written record; and (3) his confession, if any, was to be admissible against him at trial."). See also *United States v. Bascadore*, 2 F. Cas. 1028 (C.C.D.C. 1811) (No. 14,536) (excluding confession taken by suspect under oath); *United States v. Duffy*, 25 F. Cas. 922 (C.C.D.C. 1804) (No. 14,998) (John Duffy was suspected of theft, and at examination the prisoner's brothers Thomas and Christopher Duffy made sworn statements inconsistent with one another; at trial of Thomas and Christopher for the theft, the court refused to admit their examination testimony because it was given under oath).

¹¹⁹ See LANGBEIN, *supra* note 111, at 284 ("The older 'accused speaks' trial had no room for the counter-principle of silence, no means of vindicating an accused's right to silence. So long as the accused had to conduct his own defense, there could be no effective privilege against self-incrimination. Only after the rule against defense counsel was overcome was the privilege extended to protect the accused, a development overwhelmingly of the nineteenth and twentieth centuries.").

¹²⁰ See Moglen, *supra* note 113, at 1129 ("American criminal procedure in the colonial period, like the English model it closely followed, assumed the testimonial availability of the defendant at the crucial pretrial stage of the prosecution and freely made use of the defendant's admissions at trial.").

¹²¹ See LANGBEIN, *supra* note 111, at 276 ("Across the nineteenth century, as professional police increasingly assumed responsibility for gathering prosecution evidence, the urban magistrate's office would shed its prosecutorial cast."). Anglo-American criminal procedure has regarded the right to counsel and the privilege against self-incrimination as two hemispheres of plutonium that would reach critical mass if joined. As early as the start of the nineteenth century, the felt necessity

Modern police forces enabled a much cleaner division of executive and judicial functions than eighteenth century institutions permitted. The preliminary examination became a formal court appearance.¹²² Once this transformation took place, counsel became a more natural feature of the process because the courts effectively shed the interrogation function by permitting it to pass to the police. At this point, we begin to see cases in which the suspect has a lawyer during the preliminary examination.¹²³ If our focus is on the legal culture contemporaneous with the ratification of the Sixth Amendment, this development occurs very late in the day. I have, moreover, seen no nineteenth century evidence of *appointing* counsel for indigent suspects during the examination stage.¹²⁴

This is not to say that counsel never appeared during founding-era examinations.¹²⁵ If examinations were regularly held at the same place, in a system in which private counsel appeared regularly at examinations on behalf of prosecutors, we would expect lawyers to make themselves available to prisoners with the ability to pay. This would, however, be exceptional, and very far indeed from a constitutional requirement to make the resulting statements admissible.

There is at least one founding-era federal case permitting the prisoner to be heard through counsel at the examination. It beautifully illustrates how lawyerization was rendering the common-law criminal process assumed by the Bill of Rights problematic, and how unusual and discretionary the pretrial participation of defense counsel was at the founding. *United States v. Bollman* was a treason

of keeping the two great rights apart became apparent. See Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 539 (2007) (citing COPY OF CASE [SUBMITTED TO COUNSEL BY THE MAGISTRATES OF THE COUNTY OF LANCASTER] AND OPINIONS 3 (Manchester, Sheldermine & Co. 1801) (British Library shelfmark T.1177. (1.)). The magistrates in Lancaster County were troubled by the intervention of defense lawyers during Marian examinations and sought the opinions of members of the bar on how to respond to the problem (the mavers gave differing advice, the general tenor of it being that the JPs had discretion to exclude or limit counsel's participation but that the best course would be to allow counsel's participation absent criminal collusion). *Id.* For present purposes the important point is just what the JPs were worried about: Defense counsel advising suspects to stand silent.

¹²² See Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1236–37 (1932) (“By 1851 all traces of the inquisitorial preliminary examination as a legally-established step of criminal procedure had disappeared. Today the judicial inquiry type prevails in this country.”).

¹²³ See *Brown v. Commonwealth*, 73 Pa. 321, 323 (1873) (defendant Brown was represented by counsel during pretrial examination of a witness since deceased); *State v. Wilson*, 24 Kan. 189, 194 (1880) (counsel represented defense during examination of victim who later died); LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870–1910*, at 154–55 (1981) (“The Penal Code required the magistrate to ‘allow the defendant a reasonable time to send for counsel.’ (§ 859). The defendant had a right to a lawyer’s help at the preliminary examination. But this was a right to *hire* a lawyer.”).

¹²⁴ See, e.g., FRIEDMAN & PERCIVAL, *supra* note 123, at 155 (California appointed counsel for indigent felony defendants at trial but not at preliminary examination).

¹²⁵ See Kry, *supra* note 121, at 530–35 (discussing appearances of counsel at Marian examinations in England during the late eighteenth and early nineteenth centuries).

case arising from the alleged plot of Aaron Burr to raise a military force for purposes of conquest in the Louisiana territory or points south.¹²⁶ The prisoners, Erick Bollman and Samuel Swartwout, had been arrested by the military in New Orleans and brought under guard to Washington, D.C. When the President directed that Bollman and Swartwout be prosecuted in the civil courts, the U.S. Attorney for the District of Columbia moved the Circuit Court for the District to issue a warrant of arrest for treason, based on an affidavit from General Wilkinson in New Orleans and a presidential message announcing the conspiracy. The court considered the matter overnight; the next day counsel for the prisoners petitioned for a writ of habeas corpus. A majority of the Circuit Court, Chief Judge Cranch dissenting, held there was probable cause to suspect the prisoners of treason and issued the arrest warrant, which, if valid, was a good answer to the habeas petition.¹²⁷

The Circuit Court then proceeded to conduct a preliminary examination. The Attorney General of the United States, Caesar Rodney,

objected to the prisoners being heard by counsel, to show cause why they ought not to be committed. He said he objected to it upon principles of humanity, because it would excite a public prejudice against them, if they should be committed after being heard by counsel. The 4th and 8th articles of the amendments of the constitution guaranteed to them an impartial trial. It would be a usurpation, by the court, of the province of the jury. It would be an innovation upon the common practice of the country. This preliminary proceeding is always *ex parte*. The prisoners might with as much propriety insist on being heard before the grand jury.¹²⁸

Counsel for the prisoners replied:

To deny a man to be heard by counsel is to deny him a hearing. By the eighth article of the amendments of the constitution of the United States, in all criminal prosecutions, the accused has a right to the assistance of counsel for his defence. It is a serious injury to an innocent man to be committed to prison on a charge of treason. He ought to be permitted to show that, in law, the facts proved do not amount to treason; and that the offence is bailable.¹²⁹

¹²⁶ 24 F. Cas. 1189, 1189–90 (C.C.D.C. 1807) (No. 14,622). For facts and procedural history, please see *id.* at 1189–90.

¹²⁷ *Id.* at 1190.

¹²⁸ *Id.* at 1191.

¹²⁹ *Id.*

To those who study modern right-to-counsel law, these arguments will sound as familiar as they are cogent.

The court “permitted the prisoners to be heard by counsel, although FITZHUGH, Circuit Judge, and DUCKETT, Circuit Judge, doubted, as the general practice was to commit in the absence of counsel; but as this was an important case, and a new question, (at least no authority had been cited where an accused person had been denied this privilege,) they inclined to the side of lenity.”¹³⁰ Judge Cranch, who prepared the report, “had no doubt upon the question” but did not record his reasoning.¹³¹ The report then drops a footnote recording an illuminating entry from Judge Fitzhugh’s notebook. The constitutional right to counsel does not apply to preindictment proceedings, although the court might permit the prisoners to be heard through counsel as a matter of practice.¹³²

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *See id.* (“The grounds of doubt of N. F. and A. B. D., were, that the inquiry for the purpose of committing is different from that to convict. A probable cause to believe that the party is guilty, if supported by oath or affirmation, will justify commitment. This inquiry is to be before a court, and not a jury. This is, therefore, not the stage when the constitution gives him the privilege of counsel as a matter of right, and this may be inferred from comparing the 7th and 8th articles of amendments to the constitution. By the 7th article, ‘No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger,’ &c. By article 8th, ‘in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, &c., and to have the assistance of counsel for his defence.’ These two articles, evidently, cannot apply to the stages of prosecution previous to the impanelling a grand jury, and consequently the personal rights secured by them can extend only to the cases embraced by those articles. The counsel for the prisoners have not contended that the court should now call in the aid of a grand or petit jury, to ascertain their guilt or innocence; and yet the crime with which they are charged is capital and highly infamous. If the constitution does not apply, it is a case unprovided for and is left as it stands by the state laws and practice, and the laws and practice in England. As far as a deduction can be drawn from practice, it is directly opposed to the present application; and no statutory provision on the subject is recollected; nor have the counsel mentioned any. The parties are not now on their trial, nor (in the language of the article cited) are they called upon to answer; but the object of the inquiry is, whether their conduct has been such as would justify the impanelling a grand jury. But if this dilatory mode of proceeding was to prevail, public inconvenience might arise. An accused person would evade even an arrest, by employing counsel to protract the time of a justice, or of the court in attempting to prove that they have no right to issue a warrant; or after arrest there would be frequent opportunities to escape if several days might be consumed in discussing the propriety of discharging, admitting to bail, or committing, and this too in offences of the blackest dye and where bail is not allowable. In this case the court have issued a bench-warrant to arrest the accused, grounded on an affidavit, in preference to *vivâ voce* testimony; and no doubt was intimated by the bench or the bar; and yet, if the 8th article of the constitution applies, they should have been confronted with the witnesses against them. From all which we infer that the persons accused are not entitled to those privileges to which they are in a more advanced stage of the trial, when innocence or guilt is to be decided by a jury. However, if it is the wish of Dr. Bollman and M. Swartwout to be heard by counsel, we have no strong objections, as it will be the most orderly and decent way of conducting the inquiry.”). This discussion refers to the amendments by the number Congress assigned them when it sent its proposals to the states, rather than the numbers they have in today’s Constitution. The current Sixth Amendment was the eighth amendment proposed by Congress to the

Bollman (presaging *Kirby v. Illinois*¹³³ by more than one hundred and sixty years) casts important light on the original understanding of the Sixth Amendment. First, the Attorney General asserted, and the defense did not deny, that the prevailing practice did not involve defense counsel during examination.¹³⁴ Second, the circuit court agreed that “the general practice was to commit in the absence of counsel.”¹³⁵ Third, Judge Fitzhugh and Judge Duckett considered and rejected, with good reasons, the proposition that the Counsel Clause and the Confrontation Clause applied at the examination stage.¹³⁶ Counsel having appeared, they agreed to let counsel be heard, but they rejected any constitutional right to representation by counsel at examination.¹³⁷

To say that the founders did not expect the prisoner to have a right to counsel during examination does not by itself exclude the possibility that the deposition of an unavailable witness could be admitted at a subsequent trial absent cross-examination by counsel. Given that one important purpose of the examination was to memorialize testimony, however, the rejection of any right to counsel at examination casts doubt on the theory that the Confrontation Clause requires exclusion of pretrial depositions given absent counsel. And a review of practice in the early Republic shows that indeed depositions were received at later trials with no requirement of cross-examination by counsel at the examination.

The historical evidence also shows that throughout the first half of the nineteenth century, American lawyers regarded the confrontation required for prosecution hearsay to be admissible at trial to be the confrontation of the witness, under oath, by the suspect personally. This evidence includes the reported decisions, public reports of famous trials in the *American State Trials* series, American treatises on Evidence, and the various manuals issued to instruct the justices of the peace on their wide and varied duties.

states in 1791. See 1 J. Senate U.S. app. at 96, 97 (1789), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsj&fileName=001/llsj001.db&recNum=94>.

¹³³ 406 U.S. 682 (1972) (plurality opinion) (holding that Sixth Amendment right to counsel does not attach until the commencement of formal proceedings by way of indictment, information, arraignment, or preliminary hearing).

¹³⁴ *Bollman*, 24 F. Cas. at 1191.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ The rest of the story, as students of habeas corpus well know, is that the Supreme Court of the United States, per Marshall, C.J., concluded that the Supreme Court had the power to issue the writ of habeas corpus, and that the evidence against the prisoners did not disclose any offense committed within the District of Columbia. See *id.* at 1190–92. The Court, sitting with only four justices, issued the writ. See *id.*

In England, the Court of King’s Bench reached the same result as the circuit court in *Bollman*, i.e., the prisoner had no right to counsel during Marian examinations but justices might permit counsel’s participation as a matter of practice. See *Cox v. Coleridge*, 1B. & C. 37, 37, 107 Eng. Rep. 15, 15 (K.B. 1822); Kry, *supra* note 121, at 498 n.17.

The reported cases indicate that American courts did insist on cross-examination of former testimony offered against a criminal defendant, but they did not insist that this be done through counsel.¹³⁸ What mattered was the unavailability of the deponent at trial and the presence of the prisoner at the examination before trial, who could hear the witnesses and challenge their accounts. In particular, the key cases relied upon in *Crawford*—*King v. Paine*, *State v. Webb*, and *State v. Campbell*¹³⁹—all indicate that the pretrial cross-examination sufficient to make depositions admissible at trial if the deponent is unavailable is an opportunity for the prisoner himself to ask questions.

In *King v. Paine*, the witness was examined before trial by the Mayor of Bristol, who had the authority of a justice of the peace.¹⁴⁰ The opinion says nothing about counsel, and states the rule as requiring the presence of the prisoner.¹⁴¹ *Paine* was a misdemeanor case, so the defendant could legally appear through counsel at trial, which Paine did.¹⁴² *Crawford* reads *Paine* to apply in felony cases when the Sixth Amendment lifted the ban on defense lawyers in all criminal prosecutions.¹⁴³ That extension is debatable, but at most *Paine* means that even when defendants have the right to counsel at trial, personal confrontation before trial is adequate to justify admitting depositions from unavailable witnesses.

The early American cases relied on by Justice Scalia likewise indicate that the defendant's right to cross-examination during preliminary examinations was understood to be exercised personally rather than through counsel. In *State v. Webb*, the North Carolina court said that the prosecutor's "authorities do not say that depositions taken in the absence of the prisoner shall be read, and our act of Assembly 1715, ch 16, clearly implies the depositions to be read, must be taken in his presence."¹⁴⁴ *State v. Campbell* states the cross-examination requirement as demanding that the witness at the examination "must be subjected, personally, to the examination of the man he accuses."¹⁴⁵ The major division in the caselaw concerned whether a witness, such as the justice of the peace who took the examination, could testify to the gist of a deposition when it was not available in

¹³⁸ See *State v. Campbell*, 30 S.C.L. (1 Rich.) 124, 126 (Ct. App. 1844); *State v. Webb*, 2 N.C. 120, 120, 1 Hayw. 103, 104 (1794); *King v. Paine*, 87 Eng. Rep. 584, 584–85, 5 Mod. 163, 163–64 (K.B. 1696).

¹³⁹ For *Crawford v. Washington*'s reliance on these cases, see 541 U.S. 36, 45–46, 49 (2004).

¹⁴⁰ *King*, 87 Eng. Rep. at 584.

¹⁴¹ *Id.* at 585 ("[T]hese depositions should not be given in evidence, the defendant not being present when they were taken before the mayor, and so had lost the benefit of a cross-examination.") (emphasis added).

¹⁴² See *id.* (noting arguments raised by counsel for the defendant).

¹⁴³ *Crawford*, 541 U.S. at 46.

¹⁴⁴ 2 N.C. 120, 120, 1 Hayw. 103, 104 (1794).

¹⁴⁵ 30 S.C.L. (1 Rich.) 124, 126 (Ct. App. 1844).

written form, or whether a witness could testify to the prior testimony only by swearing to remember what was said on examination word-for-word.¹⁴⁶

Unofficial reports of trials cast further doubt on any claim to a historical practice of appointing counsel at examinations. For example, in 1835 a gunman pointed two pistols at President Andrew Jackson and pulled the triggers, but both weapons misfired.¹⁴⁷ Promptly arrested, the gunman was brought before the nearest magistrate, Chief Judge William Cranch of the Circuit Court for the District of Columbia, for examination.¹⁴⁸ Judge Cranch—the same Cranch who had agreed to permit Bollman's counsel to appear at examination three decades earlier¹⁴⁹—conducted the examination, and we know that the prisoner, and not counsel, questioned the witnesses.¹⁵⁰ At trial, the defense was insanity, and to rebut it, the government proved that the defendant had questioned witnesses lucidly.¹⁵¹ (The jury acquitted, but Old Hickory continued to suspect a political plot.)¹⁵²

Thomas Peake's 1802 treatise mentions a cross-examination requirement but supposes that the prisoner, not counsel, would interject for the defense.¹⁵³ The first edition of Greenleaf, published in 1842, is explicit that the prisoner would act personally, not through counsel, in cross-examining the witnesses during examination.¹⁵⁴

The JP manuals indicate, in two different ways, the implausibility of a right to exclude former testimony because it was not subject to cross-examination through counsel. First, the manuals explicitly describe the procedure to be followed after

¹⁴⁶ Compare *United States v. MaComb*, 26 F. Cas. 1132, 1135–37 (C.C.D. Ill. 1851) (No. 15,702) (witnesses may testify to substance of prior testimony even if precise words cannot be recalled) with *Commonwealth v. Richards*, 35 Mass. (18 Pick.) 434 (1836) (witness at trial must testify to precise words of examination testimony).

¹⁴⁷ *The Trial of Richard Lawrence for Shooting at President Andrew Jackson, Washington, 1835*, in 3 AMERICAN STATE TRIALS 524, 524 & n.1a (John D. Lawson ed., 1915).

¹⁴⁸ *Id.* at 534.

¹⁴⁹ *United States v. Bollman*, 24 F. Cas. 1189, 1191 (C.C.D.C. 1807) (No. 14,622).

¹⁵⁰ *The Trial of Richard Lawrence for Shooting at President Andrew Jackson*, *supra* note 147, at 534.

¹⁵¹ *Id.* (“*Judge Cranch*. The prisoner on the occasion of his first examination, was asked if he wished to put any question, after the examination of each witness.”).

¹⁵² *Id.* at 541.

¹⁵³ THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 41 (1802) (“[I]f the prisoner be not present at the time of the examination, it cannot be read as a deposition taken on oath, though in cases where a party wounded was apprehensive of, or in imminent danger of death, it may be received as his dying declaration.”).

¹⁵⁴ 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 13 (1853) (“[U]nder the constitutional provisions above mentioned [guaranteeing the right to confrontation], no deposition would be deemed admissible by force of those statutes, unless it were taken wholly in the prisoner's presence, in order to afford him the opportunity to cross-examine the witnesses.”).

arrest.¹⁵⁵ They go into such details as avoiding threats or promises to the prisoner,¹⁵⁶ what crimes were ineligible for bail,¹⁵⁷ placing the witnesses under a recognizance to appear before the grand jury,¹⁵⁸ and the manner of recording the testimony.¹⁵⁹ They sometimes direct that the examination of witnesses must be in the presence of the prisoner,¹⁶⁰ but they do not say anything about lawyers.

The second way in which the manuals cast doubt on a pretrial right to counsel is broader, but perhaps more compelling. The manuals were not written for lawyers; they are how-to manuals for the literate layman to consult as the case demanded. The manuals are organized alphabetically by topic, so that the entry for bail may be followed by another for bastards. "Evidence" is followed by "examination" because "x" comes after "v," not because there is a doctrinal connection between the two entries.

A country gentlemen or city politician would receive the sheriff, posse, or citizen who had an accused criminal in custody. He would then pull the book off the shelf and look under "arrest," the way you or I might look in a cookbook under "quail" if a hunter friend favored us with a few birds. The JP was both less and more than a lawyer; he had no formal legal training but was an important official trusted with a variety of weighty public business. If the presiding official wasn't a lawyer, why would he think to get the prisoner professional representation?

The best evidence that there was no right to appointed counsel at examination, then, is the frequency with which the admissions of the accused entered into evidence at trial. Cases with clear references to the use of pretrial testimony by an unavailable witness are rare; cases with clear references to admissions by the defendant during examination are much more common.¹⁶¹ The historical record would not take this form if defense lawyers were part of the examination process.

¹⁵⁵ During the founding era, the leading English JP manual was 1 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* (15th ed. 1785). See *id.* at 109 (procedure after arrest); *id.* at 141 (bail); *id.* at 536 (examination). Early American JP manuals include SAMUEL FREEMAN, *THE MASSACHUSETTS JUSTICE* (1795); RHODOM A. GREENE & JOHN W. LUMPKIN, *THE GEORGIA JUSTICE* (1835); WILLIAM WALTER HENING, *THE NEW VIRGINIA JUSTICE* (3d ed. 1820); HENRY HITCHCOCK, *THE ALABAMA JUSTICE OF THE PEACE* (1822).

¹⁵⁶ See, e.g., GREENE & LUMPKIN, *supra* note 155, at 100; HITCHCOCK, *supra* note 155, at 205–206 (JP should take "voluntary information of the accused").

¹⁵⁷ See, e.g., BURN, *supra* note 155, at 141; HITCHCOCK, *supra* note 155, at 61.

¹⁵⁸ See, e.g., FREEMAN, *supra* note 155, at 164 (form for recognizance of a witness); HITCHCOCK, *supra* note 155, at 207 (same).

¹⁵⁹ See, e.g., HITCHCOCK, *supra* note 155, at 205 (JP should record the questions and answers in writing); GREENE & LUMPKIN, *supra* note 155, at 99 (same).

¹⁶⁰ GREENE & LUMPKIN, *supra* note 155, at 99 ("The accuser and witnesses must be ready to confront the prisoner, in whose presence the evidence must be given."); HITCHCOCK, *supra* note 155, at 205 (duty of JP to advise the accused "of his or her, privilege, to ask any question he or she may think proper").

¹⁶¹ Greenleaf, for instance, devotes twenty-four pages to confessions but only two to confrontation. See GREENLEAF, *supra* note 114, at 247–71; GREENLEAF, *supra* note 154, at 12–14.

2. The Proposed New FRE 804(B)(5)

What would be a close modern analogue to the altercation between the suspect and the witnesses before the justice of the peace that the framers knew and approved? The closest practical analogue would be to authorize police to swear the witness and take a videotaped statement in the suspect's presence, asking the suspect if he had any questions or anything to add.

State v. Carlson arose from illuminating (and not uncommon) facts.¹⁶² A police officer went to the home of John and Lisa Carlson in response to a report of a domestic disturbance, and eventually confronted John in Lisa's presence. The officer asked about apparent needle tracks on John's arm, and John replied that he had gotten the marks while repairing his car. Lisa "broke in by yelling: 'You liar, you got them from shooting up in the bedroom with all your stupid friends.' [John] 'hung his head and shook his head back and forth.'"¹⁶³ The court rejected the state's adoptive admission theory, but affirmed Carlson's conviction on the basis of the excited utterance exception.

In such a case, the defendant confronts the witness at the time the statement is made. John could have said anything he wanted in reply to Lisa. The resemblance to the informal altercation between the witnesses and the prisoner before a justice of the peace under the Marian statutes is striking. If the suspect is either not in custody, or has waived his *Miranda* rights, there is no self-incrimination bar to confronting the suspect with a witness.¹⁶⁴ If the suspect was not yet formally charged, there would be no conflict with contemporary counsel-clause doctrine.

*Pointer*¹⁶⁵ would stand in the way, but if the justices are seriously committed to the historical approach, *Pointer* is living on borrowed time. In *Pointer*, moreover, the state was represented by counsel,¹⁶⁶ an important difference between a witness-suspect confrontation during the course of a police investigation. Statements made in this context clearly are testimonial, but they are, at least in historical terms, subject to cross-examination.

Cross-examination through counsel, of course, adds greatly to reliability, as Yale Kamisar showed decades ago in his celebrated send-up of *Betts v. Brady*.¹⁶⁷ In the Confrontation Clause context, however, trial testimony of an unavailable witness is by hypothesis unavailable. The Sixth Amendment right to counsel does not apply prior to the indictment, information, arraignment or equivalent indicia that the formal adjudicatory process has begun. So the questions are whether, as a matter of evidence law, the pretrial statement is reliable enough for the jury to

¹⁶² 808 P.2d 1002 (Or. 1991) (en banc). For facts and procedural history, see *id.* at 1002–04.

¹⁶³ *Id.* at 1004.

¹⁶⁴ See *id.* at 1004–05 (noting that John was not in custody for *Miranda* purposes).

¹⁶⁵ *Pointer v. Texas*, 380 U.S. 400 (1964).

¹⁶⁶ *Id.* at 401.

¹⁶⁷ See Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962).

hear,¹⁶⁸ and, as a constitutional matter, whether admitting it comports with *Crawford*.

The historical digression above shows, I submit, that admitting statements made to police in the presence of the suspect comports with *Crawford*. Police are not judges, but the founding-era justice of the peace typically was not a lawyer and had both executive and judicial duties. To call these early justices of the peace a judge is about as accurate as calling a swiss-army knife a bottle opener. Investigating crime, which these JPs clearly did, is an executive function regardless of how many hats the investigator wears in other contexts.

Such an approach would provide all of the safeguards against false testimony the founders valued: the oath, the perjury penalty, face-to-face confrontation, and the right to cross-examine the witness personally. Modern technology would enable the jury to see and hear the testimony, something that was impossible in 1791.¹⁶⁹ If the witness becomes unavailable for trial, a case can be made for admitting such statements, whether we are concerned with history or with reliability.¹⁷⁰

Subdivision (a) of the proposed rule accounts for hearsay concerns by requiring that the statement satisfy some other hearsay exception such as excited utterance or the catch-all. These statements are admitted routinely, without cross-examination of any sort, in civil cases, in criminal cases against the prosecution, and against the defense when not classified as testimonial. Under the proposed rule, an officer called to the scene of a domestic violence incident could testify at trial to an accusation by an agitated spouse, provided the accusation was made to the face of the defendant and the declarant is unavailable at trial. Such statements satisfy *Crawford*'s historical understanding of confrontation, and the current excited-utterance exception to the hearsay rule.

¹⁶⁸ Professor Pettys makes the important point that free-standing due process might prohibit use of pretrial statements which afforded only the opportunity for cross-examination by the suspect *pro se*. See Todd E. Pettys, *Counsel and Confrontation*, 94 MINN. L. REV. 201 (2009). The founders' comfortable reception of depositions taken under the Marian system undercuts any historical due process claim. Any argument that receiving such statements from unavailable declarants is "fundamentally unfair in operation" reduces to the reliability issue treated in text as a matter of evidence law.

¹⁶⁹ "Several factors support routine videotaping of depositions: (1) video more accurately represents deponents' communication; (2) American courts prefer live testimony, and video clearly satisfies the judicial preference for live testimony better than stenographic recording does; (3) video increases jurors' retention of deposition testimony" Rebecca White Berch, *A Proposal to Amend Rule 30(b) of the Federal Rules of Civil Procedure: Cross-Disciplinary and Empirical Evidence Supporting Presumptive Use of Video to Record Depositions*, 59 FORDHAM L. REV. 347, 349 (1990) (footnotes omitted). Given that victim/suspect confrontations would often be sudden and spontaneous, the proposed rule does not require videotaping.

¹⁷⁰ Obviously cross-examination through counsel adds much to the reliability of statements obtained before trial. If the declarant is available to testify at the trial, there would be no justification for introducing testimony taken before trial until the declarant testifies contrary to the pretrial testimony at the trial.

Under the proposed rule, sworn statements taken down in writing, or electronically recorded, like Amy Hammon's affidavit, would be admissible if they met the criteria of the FRE 807 catch-all exception, provided that they were made in the suspect's presence with a fair opportunity for response.¹⁷¹ Admissibility would not be automatic, but when the victim is unavailable at trial and conclusive evidence such as a confession is absent, the statement would ordinarily be the best available evidence. It would be sworn, subject to the penalty for perjury, and given while physically confronting the accused, a factor the Court has pointed to as supporting reliability.¹⁷² When reduced to writing, or, better still, electronically recorded, doubts about the existence or content of the statement would be reduced to a practical minimum.

In *Idaho v. Wright*, the Court rejected corroboration as a factor supporting reliability for Confrontation Clause purposes under *Roberts*.¹⁷³ *Wright* was a state case¹⁷⁴ and so could raise only constitutional issues, not issues under the federal rules, and since *Crawford* overruled *Roberts*,¹⁷⁵ there is nothing left of *Wright*. In cases not subject to Confrontation Clause analysis (civil cases and evidence for the defense in criminal cases) corroboration remains an important prop for admissibility under the catch-all exception.¹⁷⁶ Observations by the police, and medical testimony, can often corroborate the existence of injuries consistent with criminal assault.

Subdivision (b) of the proposed rule permits the defense to introduce the defendant's response to any statement admitted under subdivision (b). The prosecution may of course introduce such statements as party admissions, but absent a specific provision defense use of the defendant's out-of-court statements would be hearsay. Absent the proposed subdivision (b), admissibility of these statements would depend on the *ad hoc* application of the various exception to the hearsay rule. Fairness calls for automatically permitting the defense to introduce the defendant's account at the time of the confrontation.

¹⁷¹ Of course, the batterer is often gone by the time police arrive at the scene. If the absent suspect were later arrested and waived *Miranda*, he could be transported to the scene for a confrontation with the complaining witness. Whatever was said there would satisfy the historical meaning of the Confrontation Clause, leaving only the familiar hearsay issues.

Also, many such statements now are potentially admissible under the vicarious admissions doctrine. The proposed rule does not cut back on this doctrine, but it also covers statements by the defendant explaining or denying the accusation at the scene. In the interests of fairness, subdivision (c) authorizes admission of anything the accused said by way of challenge or qualification to the accusation against him.

¹⁷² See *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'").

¹⁷³ 497 U.S. 805, 821 (1990).

¹⁷⁴ *Id.* at 805.

¹⁷⁵ *Crawford v. Washington*, 541 U.S. 36, 37 (2004).

¹⁷⁶ See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE*, § 8.141 (3d ed. 2009).

In a formal sense, the proposed amendment works no real change. The existing exceptions permits the admission of qualifying statements as a matter of evidence law, and if I am right about history, a showing of contemporaneous personal confrontation would satisfy the Confrontation Clause as now construed. The constitutional opportunity presented by personal confrontation, however, is at present little-understood outside the legal academy. The courts cannot embrace or reject the theory of personal confrontation until trial records frame the issues. Amending the rule would encourage police to take statements in the suspect's presence, and to lower courts to admit such statements over objections based on *Crawford* and *Pointer*.

Courts might or might not agree that *Crawford* implies the downfall of *Pointer*, but there is no harm in asking them to say so. Until police take witness statements in the presence of the suspect but the absence of defense counsel, courts will not have the chance to consider the constitutionality of a founding-era examination administered by modern police. Changing the evidence rules to admit these statements would give police a clear-cut incentive to proceed as suggested.

C. Presuming Forfeiture

The final proposed reform provides for a presumption of forfeiture by wrongdoing upon proof that the accused previously assaulted or threatened the witness or the witness's family. The amendment would revise FRE 804(b)(6) to read as follows, again with my proposed language in italics:

(b) Hearsay exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. *In a criminal case, upon proof by a preponderance of the evidence that the accused, at any time, assaulted an unavailable witness, or threatened to inflict physical harm upon an unavailable witness or any member of the witness's immediate family, the court may presume forfeiture of both hearsay and Confrontation Clause objections. This presumption may be rebutted by proof by a preponderance that the accused did not engage in, and did not acquiesce in, wrongdoing intended to cause the witness not to testify.*

In the domestic violence context, fear of retaliation, often justified not just by unilateral prediction but by threats by the abuser, is the single most common reason for the victim's failure to testify.¹⁷⁷ A recent literature review reports that:

A study of five jurisdictions in three states found that victims across all sites reported that fear of defendant retaliation was their most common barrier to participation with prosecutors. Even in a Chicago study where the majority of Chicago victims wanted their abusers prosecuted, fear was the biggest factor for those who opposed prosecution. A quarter of victims opposing prosecution reported being specifically threatened by their abusers¹⁷⁸

The concept of wrongdoing intended to silence the witness covers more than bald threats. Appeals to affection and promises of reward, as by an abuser's pledge to change if the victim opposes the prosecution, intended to deflect a witness from the legal duty to testify would also qualify as witness-tampering.¹⁷⁹ Other reasons for victim noncooperation also exist; the victim may be alienated from the police and prosecution, she may protect the abuser out of love, she might believe prosecution is futile, or she might be afraid that a conviction would injure her and/or her children financially.¹⁸⁰

¹⁷⁷ See KLEIN, *supra* note 69, at 46 ("Although studies have found multiple reasons for victim opposition to prosecution, fear is among the leading reason [*sic*] expressed by victims. Fear of the abuser is first and foremost, followed by fear of testifying in court.").

¹⁷⁸ *Id.* (footnotes omitted). See also Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 868–69 (2009) ("Given the 'control motive' and the persistence of domestic violence in many relationships, it is not surprising that batterers threaten reprisals if their victims testify or otherwise cooperate with law enforcement. Reprisals might include renewed violence, abduction of children, or economic retaliation. One study found that batterers threaten retaliatory violence in as many as half of all cases, and 30% actually assault their victims again during the predisposition phase of prosecution. Some evidence suggests that witness intimidation is increasing, particularly in prosecutions of domestic violence. Victims of domestic violence are more vulnerable to witness tampering than victims of other crimes. In fact, data show that the time when a victim decides to break free of a violent relationship is the most dangerous time; this is the time when the majority of domestic violence homicides take place.") (footnotes omitted).

¹⁷⁹ See *United States v. Arnold*, 410 F.3d 895, 916 (6th Cir. 2005) ("Wrongful conduct obviously includes the use of force and threats, but it has also been held to include persuasion and control by a defendant, the wrongful nondisclosure of information, and a defendant's direction to a witness to exercise the fifth amendment privilege." (quoting *Steele v. Taylor*, 684 F.2d 1193, 1201 (6th Cir. 1982))).

¹⁸⁰ See, e.g., Kimberly D. Bailey, *The Aftermath of Crawford and Davis: Deconstructing the Sound of Silence*, 2009 BYU L. REV. 1, 43–44 ("While fear of retaliation may be one of the reasons that victims do not testify against their batterers, other key reasons that they do not testify are a lack of material resources, a lack of protection from the criminal justice system when they do testify, and a lack of quality interactions with the criminal justice system.") (footnotes omitted).

So there is little doubt that a defendant pressuring the victim of domestic violence not to testify is both effective and pervasive. The problem is how to assess the forfeiture issue in individual cases.¹⁸¹ At present, the standard rule, explicitly provided by FRE 804(b)(6), is that the prosecution must prove forfeiture by a preponderance. Sometimes this burden can be met, especially given that the ban on hearsay does not extend to pretrial rulings on admissibility.¹⁸²

[M]any victims are, at some point in the process, quite candid about their reasons for wishing charges to be ‘dropped’; their hearsay statements are generally admissible at a forfeiture hearing. Other evidence might include orders of protection, family court petitions and transcripts, prior police reports, and expert testimony on the effects of battering.¹⁸³

Given that the rules of evidence, including the character rules, do not apply at rulings on evidence, prior acts of violence by the accused against the victim are clearly relevant to the issue of forfeiture. They show a motive to dominate the victim and a propensity to engage in violence for self-interest. The question is when a pattern of violence is so clear as to satisfy the government’s proof burden.¹⁸⁴ At least under current law, something more is required than proof of violence prior to, or limited to, the act charged in the pending case.¹⁸⁵

¹⁸¹ The problem in determining if forfeiture has occurred is that the declarant is absent, so we will often not have statements by her establishing threats by the defendant. Studies have found that many women do face pressure, but that is not evidence that a particular defendant intimidated the witness. Other reasons may cause her absence including: her emotional ties to the batterer, the potential loss of financial support for herself and her children if he is convicted, or her belief that she can control the battering by the use of an arrest without prosecution. In addition, in a growing number of cases, she may worry that her batterer’s prosecution will result in her children being placed in foster care or in her facing charges of child endangerment.

Myrna Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 364 (2005) (footnotes omitted).

¹⁸² See, e.g., FED. R. EVID. 104(a) (“In making its determination [the court] is not bound by the rules of evidence except those with respect to privileges.”).

¹⁸³ See Deborah Tuerkheimer, *A Relational Approach to the Right of Confrontation and Its Loss*, 15 J.L. & POL’Y 725, 750–51 (2007) (footnote omitted).

¹⁸⁴ See *People v. Jernigan*, 838 N.Y.S.2d 81, 82 (App. Div. 2007) (finding that record showed clear and convincing evidence of forfeiture without direct proof of threats; pattern of violence coupled with proof of appeals to affection and proof of 59 telephone calls of unknown content provided sufficient circumstantial proof of intimidation).

¹⁸⁵ See *Giles v. California*, 128 S. Ct. 2678, 2693 (2008) (in a homicide case, forfeiture can still be proved, and “[e]arlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify”) (emphasis added). Cf. *United States v. Montague*, 421 F.3d 1099, 1104 (10th Cir. 2005) (“[P]re-prosecution conduct may be insufficient to warrant application of the wrongdoing/forfeiture exception”) (footnote omitted).

Sadly, the absence, noncooperation, or recantation of the witness may mean that proof of forfeiture will not be possible in many cases where the doctrine applies in-fact. Even when direct evidence is available, collecting and presenting it is costly, drawing resources away from other meritorious cases. The law of evidence often deals with this pattern of one fact that systemic experience has found to entail a typical further fact insusceptible of direct proof. The standard, and in this case appropriate, response to the problem is a presumption.¹⁸⁶

We deal here with a procedural rule that turns on facts found by the court, not a fact bearing on substantive liability to be determined by the jury.¹⁸⁷ Putting a proof burden by a preponderance of the evidence on the criminal defense is not *per se* unconstitutional. A defendant challenging competence to stand trial may likewise be obliged to bear the burden of proof by a preponderance, but not by clear and convincing evidence.¹⁸⁸ Even on some factual issues that exculpate on the merits of a criminal charge, such as insanity, provocation, or self-defense, legislatures may place the burden of proof on the defense.¹⁸⁹

The proposed amendment does not go so far as an out-and-out shift of the burden of proof on the forfeiture issue. Rather, it creates a permissive presumption of the sort upheld for issues at trial in *County Court of Ulster County v. Allen*.¹⁹⁰ The Court approved something quite similar when it extended the burden-shifting procedures of the *Batson* doctrine to peremptory challenges made by the criminal defendant.¹⁹¹ Under this approach, a court ruling on forfeiture would require *some* direct evidence of wrongdoing by the accused, and this direct proof, reinforced by

¹⁸⁶ See, e.g., *Turner v. United States*, 396 U.S. 398, 408–09 (1970) (upholding constitutionality of rebuttable presumption that heroin in possession of a person in the United States was imported, given legislative finding that all heroin in the U.S. is imported); *Mo. Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 143–44 (1964) (applying presumption of carrier's negligence given otherwise unexplained spoliation of goods in transit).

¹⁸⁷ See FRE 804(b)(6) advisory committee's note ("The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior new Rule 804(b)(6) seeks to discourage."). The Supreme Court has adopted the preponderance standard for pretrial evidentiary rulings even when constitutional rights are at stake. See *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974).

¹⁸⁸ See *Cooper v. Oklahoma*, 517 U.S. 348, 368–69 (1996) (clear and convincing standard of proof imposed on defendant challenging competence to stand trial violates due process); *Medina v. California*, 505 U.S. 437, 449–51 (1992) (state may put burden of proof by a preponderance on the party challenging competence to stand trial).

¹⁸⁹ See *Martin v. Ohio*, 480 U.S. 228, 236 (1987) (self-defense); *Patterson v. New York*, 432 U.S. 197, 206–07 (1977) ("extreme emotional disturbance" version of provocation excuse); *Leland v. Oregon*, 343 U.S. 790, 798–99 (1952) (insanity).

¹⁹⁰ *County Court of Ulster County v. Allen*, 442 U.S. 140, 157 (1979) ("Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.").

¹⁹¹ See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (*Batson* doctrine applies to defense use of peremptory challenges).

the presumption of wrongdoing from nonappearance of the witness, would permit but not require the court to find a preponderance in favor of the government.

Giles does not stand in the way.¹⁹² In *Giles*, the state premised forfeiture on the murder of the witness without proof of a motive to silence.¹⁹³ The proposed rule permits evidentiary use of the acts constituting the charged offense (as well as any other violence or intimidation against the witness by the accused) to support an inference of post-offense improper pressure. The presumption does not characterize the acts charged as the acts that forfeit the objection, but as evidence that subsequent improper conduct caused the (otherwise unexplained) unavailability of the witness.

The proposed rule's operation can be illustrated by a hypothetical variation on *Giles*. Suppose that Giles shot Brenda Avie, his former girl friend, but (unlike the actual case) she survived the shooting. Suppose further that, although under subpoena, she disappears on the eve of trial rather than testify. Given proof by a preponderance that the defendant had attempted to murder the witness in the recent past, the proposed rule would presume improper pressure by the defendant as the reason for the witness's nonappearance (or noncooperation).

The premise of the presumption is not that victim noncooperation is more often than not the result of threats or promises by the defendant. Instead, it is that improper pressures are the most common cause, and when successful, are hard to prove.¹⁹⁴ The proposed rule does not compel a finding of forfeiture by wrongdoing. It only shifts the burden of proof to account for the *ex ante* probabilities and the proof problem.

The preponderance standard is only a tie-breaker, but a very important tie-breaker when proof is scarce. A presumption that the unexplained nonappearance of a witness previously beaten or threatened by the accused, is due to subsequent wrongdoing by the accused is entirely rational, and of course, would be subject to rebuttal by the defense. Rebuttal evidence might include proof of independent causes of unavailability (e.g., death or incapacity from natural causes, or taking a job in a different jurisdiction). It might also include case-specific circumstantial evidence, as well as the defendant's testimony.¹⁹⁵

¹⁹² *Giles v. California*, 128 S. Ct. 2678 (2008). See *supra* text accompanying notes 94–100.

¹⁹³ *Giles*, 128 S. Ct. at 2682.

¹⁹⁴ Professor Lininger's proposed amendment, as I understand it, would forfeit the defendant's objection on proof of acts that foreseeably might, and in fact do, cause the witness not to testify. See Lininger, *supra* note 178. By contrast, my proposal infers post-offense pressures from prior violence by the accused against the victim, including but not limited to the acts alleged in the pending charge. I am not convinced that his proposal conflicts with the rationale of *Giles*, but I am more confident that my proposal would survive constitutional scrutiny.

¹⁹⁵ Presumably, the rule of *Simmons v. United States*, 390 U.S. 377, 390–91 (1968), barring use at trial of the defendant's testimony at a prior suppression hearing, would apply to the defendant's testimony at a pretrial hearing on forfeiture of confrontation rights.

VI. CONCLUSION

The difficulty of proving meritorious domestic violence cases is not the most important problem with criminal justice in the United States. Mass incarceration with disparate racial impact, overcriminalization generally, neglect of indigent defense, and the lawless discretionary power of public prosecutors are each, to my mind, more disturbing. Unlike these latter challenges, however, low-cost, politically plausible, incremental reforms of the sort proposed could go far to improve the search for truth. Such opportunities are rare. When they arise, rule drafters, legislators, police administrators, and judges should seize them—with both hands.